

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ CRL.M.C. 1867/2019 & CRL.M.A.9837/2019

Judgment reserved on :15.10.2019
Date of decision :07.01.2020

HAR SARUP BHASIN

..... Petitioner

Through: Ms. Urvika Suri, Advocate.

versus

M/S ORIGO COMMODITIES INDIA PVT. LTD. Respondents

Through: Mr.Purushotam, Advocate.

CORAM:

HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J.

1. The petitioner namely Mr. Har Sarup Bhasin vide the present petition seeks the quashing of the order dated 20.02.2017 of the Trial Court of the learned MM-01, New Delhi and the quashing of the complaint i.e. CC No.45438/2016 vide which the petitioner was summoned for the alleged commission of an offence punishable under Section 138 of the Negotiable Instruments Act, 1881. The said complaint under Section 138 of the Negotiable Instruments Act, 1881 has been filed by the complainant M/s Origo Commodities India Pvt. Ltd. arrayed as the respondent to the present petition against the persons arrayed as the accused nos. 1 to 7 i.e. M/s Dinesh Oil Limited,

Mr. Dinesh Arora, Ms. Shalini Arora, Mr. Narendra Sharma, Mr. Shyam Kant Tiwari, Mr. Har Sarup Bhasin and Mr. Nikit Rastogi and the petitioner herein arrayed as the respondent no.6 to the said complaint case.

2. The complainant i.e. the respondent through the complaint has alleged that the accused no.1 i.e. M/s Dinesh Oil Limited (hereinafter referred to as the accused company) had availed the services of the complainant i.e. the respondent by way of sale of 250 metric tones of Crude Palm Oil (Edible Grade) in bulk vide Bill of Lading No.DUM/KDL-02 dated 17.03.2016 at the rate of Rs.43,381.10/- per MT which were supplied by the respondent to the accused company pursuant to an agreement for procurement services dated 07.01.2016 executed between the parties. The complainant had averred in the complaint that the accused company was engaged in the business of trading and manufacturing edible/ vegetable oils and other agricultural commodities and that the accused no.2 was the Managing Director and the Whole Time Director of the accused company and that the accused nos. 3 to 7 are the whole time Directors of the accused No.1 the accused company and that the accused nos. 2 to 7 are incharge and responsible for the conduct of the day to day business of the accused No.1 company towards the payment in relation to the services received by the accused No.1 the accused company towards part discharge of its liability to pay the outstanding amount to the complainant i.e. the respondent herein, the accused No.1 company *inter alia* drew two cheques bearing No.185257 & 185258 dated 07.06.2016 for a sum of Rs.50,00,000/- each drawn on the State Bank of India, SME Branch,

Sarvoday Nagar, Kanpur, Uttar Pradesh which were returned unpaid due to reason of insufficient funds vide a cheque return memo dated 09.06.2016.

3. Through the complaint, it has been stated by the complainant i.e. the respondent that after the issuance of the cheques in discharge of its liability, the accused had failed to make arrangements in their bank for honouring the said cheques and had thereby committed an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 and that the accused nos. 2 to 7 were in active connivance with the accused no.1 to take malafide steps to ensure the dishonour of the cheques. The complainant i.e. the respondent has further stated through the complaint that it had complied with all the requirements of Section 138 of the Negotiable Instruments Act, 1881, in as much as the cheques in question were presented within the period of their validity and that the demand for the payment was made to the accused on 15.06.2016 within 30 days of the receipt of the information regarding the dishonouring of the cheques on 09.06.2016 but that the accused failed to make the payment within 15 days of the notice and sent a reply dated 29.07.2016 taking baseless defences.

4. Vide the impugned summoning order dated 20.02.2017, it was observed by the learned Trial Court to the effect:-

“20.02.2017”

**Present: AR for complainant in person along with Ld.
Counsel.**

File perused. Heard.

Evidence by way of affidavit tendered by AR of complainant. Original documents have been filed on record along with the complaint. Statement of AR of complainant recorded separately. Documents have been exhibited. Presummoning evidence closed on behalf of complainant.

Arguments heard on the point of summoning. Record of the file perused. All the statutory requirements under NI Act are complied with. The present complaint case is filed within time limitation. After perusal of the entire record, this Court is of the considered opinion that prima facie case punishable u/s 138 of NI Act is made out against the accused. I, therefore, take cognizance of the offence u/s 138 of NI Act, 1881.

Issue summons to the accused on filing of PF/RC/AD/ speed post, returnable on 23.06.2017.

Steps be taken within three weeks.”

5. The petitioner vide the present petition submits that grave miscarriage of justice has been caused to him by way of his having been summoned mechanically. The petitioner further submits that the summons were only issued at the address of the accused no.1 i.e. the accused company and not at his address i.e. 117/64, Q-Block, Sharda Nagar, Naveen Nagar, Bilhaur, Kanpur, Uttar Pradesh; that the petitioner had joined the accused No.1 company as an Independent, Non-executive Director and that he was never involved in the day to day affairs of the company at any point in time. The petitioner further submits that on 27.06.2016, he had filed a resignation letter under Section 168 of the Companies Act, 2013 and subsequently ceased to be an Independent Director of the accused company.

6. The petitioner has further submitted that he has not signed the cheques bearing No.185257 & 185258, nor were they issued under his knowledge and that no case is made out against him and that the complaint ought to be dismissed. The petitioner also submits that no notice was received by him nor was any notice issued to the respondent no.6 by the complainant. The petitioner has further submitted that the respondent has not made any specific allegations against him to show as to how the petitioner had knowledge or was involved in the transaction alleged in the complaint and that the mere statement that the petitioner is a Director, cannot make him liable. The petitioner has further submitted that the accused company had specifically stated in reply to the demand notice that the petitioner cannot be held liable as he was merely an Independent Director of the accused company and not incharge of the business of the accused no.1 company.

7. The petitioner has further submitted that the respondent has fraudulently misrepresented him to be a Whole Time Director of the company whereas it is clear from the record and the reply to the demand notice that the petitioner was an Independent, Non-Executive Director of the company and thus, no vicarious liability can be inferred against the petitioner under Section 138 r/w Section 141 of the Negotiable Instruments Act, 1881.

8. *Inter alia* it has been submitted by the petitioner that in terms of Section 149(2) of the Companies Act, 2013, it has been categorically provided that an Independent and/ or Non-Executive Director (not being a promoter or a key managerial personnel) shall be held liable in

respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable to such Director through a board process or was done with his consent or connivance or where he had not acted diligently and that the respondent failed to disclose any of the circumstances provided under Section 149 (12) of the Companies Act, 2013 failing which no liability, vicarious or otherwise, can be attributed against the petitioner herein.

9. *Inter alia* the petitioner has placed reliance on the verdicts of this Court in “**Kanarath Payattiyath Balraj vs. Raja Arora**” 2017 SCC Online Del 7418 and in “**Bhardwaj Thuiruvenkata Venkatavraghavan vs. Ashok Arora and Ors.**” CRL.M.C. No. 3252/2016 and reliance is also placed on behalf of the petitioner on the verdicts of the Hon’ble Supreme Court in “**Gunmala Sales Private Limited vs. Anu Mehta and Ors**” (2015) 1 SCC 103 and in “**Pooja Ravinder Devidasani vs. State of Maharashtra** (2014) 16 SCC 1 to contend to similar effect.

10. The petitioner has further submitted that the averments made against him are merely general, vague and bald and that the complaint is bereft of any specific averment to show as to how and in what manner the petitioner is responsible for the business of the accused no.1 company and that thus, no criminal liability can be fastened on the petitioner. The petitioner further submits that even the accused company through its reply to the demand notice had admitted that the role of the petitioner was that of an Independent Director who was not responsible, nor aware of the day to day activities.

11. Through the reply submitted on behalf of the respondent, it has been submitted that the petitioner has withheld material facts and that the complainant i.e. the respondent had specifically averred in the criminal complaint that the accused nos. 2 to 7 which included the petitioner herein were incharge and responsible for the day to day conduct of the business of the accused company. The respondent has further submitted that the financial statement for the period 01.04.2015 to 31.03.2016 of the accused company filed with the Registrar of the Company's named the petitioner as a 'Key Managerial Person' of the company and that the copy of the MGT-07 for the period 01.04.2015 to 31.03.2016 of the accused company indicated the same.

12. The respondent i.e. the complainant has further submitted that the petitioner was also part of various committees of the accused, including the Audit, Nomination and Remuneration and Corporate Social Responsibility (CSR) committee and that the petitioner was the only one along with the promoter Director, Dinesh Arora who had attended 100% of all these meetings which necessitates him being aware of the finances of the company and the working of the company. The respondent has further submitted that in as much as, the petitioner falls within the ambit of a key managerial personnel as defined under Section 2(53) of the Companies Act, 2013, he being responsible for the working of the company, cannot be considered an Independent Director and has further submitted that the petitioner had been a Director in the accused company since 01.10.2011 and the accused no.1 company is a closely held company and the petitioner

was appointed therein on account of his close working and family relationship with the promoter Directors and was involved in the day to day running of the company and that the petitioner had not disclosed any other special qualification for allegedly being appointed as an Independent Director.

13. The respondent has further submitted that the cheques in question were dishonoured in the first week of June 2016 and consequently a legal notice was issued on 15.06.2016 and that it was only after the receipt of the legal notice that the petitioner resigned as a Director of the company w.e.f. 27.06.2017 and that there was a clear attempt on the part of the petitioner herein to wriggle out of the consequences for misappropriating the goods supplied by the respondent and that the accused company not paying for the same. *Inter alia* the respondent has submitted that the petitioner till date continues to reside at Kanpur and the averments to the contrary made in the petition are false and baseless.

14. Reliance was *inter alia* placed on behalf of the petitioner on a catena of verdicts to contend to the effect that the petitioner being an Independent, Non-Executive Director of the accused company, he was not involved in the day to day affairs of the company at any point of time and the petitioner not being a signatory to the said cheques and the said cheques having not been issued to his knowledge, the petitioner cannot be made liable for the dishonoring of the cheques in question and that the petitioner had also resigned from the accused company on 27.06.2016 vide a resignation letter under Section 168 of the Companies Act, 2013.

15. Reliance was placed on behalf of the petitioner in relation to the contention that the Independent, Non-Executive Directors, cannot be held to be involved in the day to day affairs of the company on the verdict of this Court in "*Bhardwaj Thirvenkata Venkatavaraghavan Vs. Ashok Arora and Ors.*" 2017 SCC OnLine Del 7416 with specific reference to paragraphs 3 & 14, which read to the effect:-

"3. The two-fold contentions of learned counsel for the petitioner are that the petitioner is the independent non-executive nominee director and thus cannot be fastened with the vicarious liability to pay the dues of the company, and that the petitioner resigned from the company on 18th November, 2015 before the cause of action accrued i.e. payment was not made despite service of legal demand notice. Hence the complaints and the impugned order summoning him are liable to be quashed qua the petitioner.

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14. Merely because the petitioner is the Director of Sequoia India Investment Holding which finances Vasan Health Care and by virtue thereof is a nominee independent director of Vasan Health Care, he cannot be held to be responsible for the day-to-day affairs of Vasan Health Care. Even otherwise the contentions now raised during the course of arguments and in the reply affidavits are not part of the complaints. In the complaints it is merely stated that accused No. 2 to 8 are the directors of the company and have been actively participating in day-to-day affairs of the company and take all the decisions for the company. Admittedly, the petitioner is not the Managing Director of Vasan Health Care nor the signatory to the cheque. He is also not the person responsible for day-to-day functioning of Vasan

Health Care. No vicarious liability can be fastened on the petitioner in the absence of specific role being attributed to the petitioner.”,

to contend that Independent, Non-Executive Directors are not involved in the day to day affairs of the company;

on the verdict of the Hon’ble Supreme Court in “***Pooja Ravinder Devidasani Vs. State of Maharashtra & Anr.***” (2014) 16 SCC 1 to contend to similar effect with specific reference to paragraphs 17 & 25 thereof, which read to the effect:-

“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 Corp. [National Small Industries Corp. Ltd. v. Harmeeet 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 fulfillment of the requirements under Section 141."

(emphasis in original)

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25. A bare reading of the averment of Respondent No. 2 before the High Court, suggests that his case appears to be that the appellant has not proved her resignation in unequivocal terms and it is a disputed question of fact. It is noteworthy that the respondent No. 2 except making a bald

statement and throwing the burden on the appellant to prove authenticity of documents, has not pleaded anywhere that the public documents Form 32 and Annual Return are forged and fabricated documents. Curiously, respondent No. 2 on the one hand raises a doubt about the genuineness of Form 32, a public document, through which the default Company had communicated the change of Directors to the Registrar of the Companies with the effect of resignation of the appellant and induction of two Directors-Operations and on the other hand, he has arrayed the two newly appointed Directors-Operations as accused whose names were communicated to the Registrar of Companies by the very same Form 32. The respondent/complainant cannot be permitted to blow hot and cold at the same time. When he denies the genuineness of the document, he cannot act upon it and array the newly appointed Directors as accused.”,

and to contend thus, that Form-32 submitted by the petitioner is a public document, the correctness of which has to be accepted;

on the verdict of this Court in “*Chanakya Bhupen Chakravati & Anr. V. Mrs. Rajeshri Karwa*” 2018 SCC OnLine Del 12968 with specific reference to paragraphs 7, 9 & 10 of the said verdict, which read to the effect:-

“7. It may be that under the articles of association of the company accused, the petitioners being the non-executive directors nominated by the investor company have some role to play on the board of directors. It may also be that no meeting of board of directors could be convened without at least one of them being present. But then, there is some distinction between being privy to what were the affairs of the company and being responsible for its day-to-day affairs or conduct of its business.

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9. The respondent (complainant) concededly had received the replies on behalf of the petitioners to the demand notices issued in the wake of the dishonor of the cheques which are the subject matter of these eight petitions. By the said replies, they had specifically informed the complainant that they had no role to play in the day-to day affairs of the accused company or conduct of its business. It was the responsibility against this backdrop, to set out as to why they wanted to proceed against the petitioners as well. The complaints are conspicuously silent on this score. Rather the complaints would not even acknowledge receipt of the said replies. Same is the position with the affidavits which were filed during the pre-summoning inquiry. The complaints, insofar as they are directed against the petitioners, would, thus, fail even on the averment test.

10. Having regard to the above facts and circumstances, the petitioners concededly being non-executive directors, in absence of any further averments as to their role in the company at the time of commission of the offences, the presumption under Section 141 NI Act cannot be raised against them.”,

on the verdict of this Court in “**Kanarth Payattuyath Balraj V. Raja Arora**” 2017 SCC OnLine Del 7418 with specific reference to paragraphs 8, 9 & 15 of the said verdict, which read to the effect:-

“8. The Reserve Bank of India vide its Master Circular No RBI/2012-13/43 dated 2nd July, 2012 on ‘Wilful Defaulters’ issued directions with respect to the reporting of names of Directors and the position regarding Independent and Nominee Directors. Relevant Paras 5.1 and 5.2 of the Circular read as under:

“5.1 Need for Ensuring Accuracy RBI/Credit Information Companies disseminate information on non-suit filed and suit filed accounts respectively, as reported to them by the banks/FIs and responsibility

for reporting correct information and also accuracy of facts and figures rests with the concerned banks and financial institutions. Therefore, banks and financial institutions should take immediate steps to update their records and ensure that the names of current directors are reported. In addition to reporting the names of current directors, it is necessary to furnish information about directors who were associated with the company at the time the account was classified as defaulter, to put the other banks and financial institutions on guard. Banks and FIs may also ensure the facts about directors, wherever possible, by cross-checking with Registrar of Companies.

5.2. Position regarding Independent and Nominee directors Professional Directors who associate with companies for their expert knowledge act as independent directors. Such independent directors apart from receiving director's remuneration do not have any material pecuniary relationship or transactions with the company, its promoters, its management or its subsidiaries, which in the judgment of Board may affect their independent judgment. As a guiding principle of disclosure, no material fact should be suppressed while disclosing the names of a company that is a defaulter and the names of all directors should be published. However, while doing so, a suitable distinguishing remark should be made clarifying that the concerned person was an independent director. Similarly the names of directors who are nominees of government or financial institutions should also be reported but a suitable remark 'nominee director' should be incorporated. Therefore, against the names of Independent Directors and Nominee Directors, they should indicate the abbreviations "Ind." and "Nom" respectively in brackets to distinguish them from other directors."

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9. The legality and validity of the Master circular dated 2nd July, 2012 was challenged before a Division Bench of the Gujarat High Court in Ionic Metalliks v. Union of India, 2014 SCC OnLineGuj 10066; (2015) 2 GLH 156. The court while deciding the issue noted the categories of Directors under the Companies Act and the Listing Agreement prescribed by Securities and Exchange Board of India (in short SEBI) as:

“A. Classification under the Companies Act

Categories of Directors

The Companies Act refers to the following two specific categories of Directors:

- 1. Managing Directors; and**
- 2. Whole-time Directors.**

A Managing Director is a Director who has substantial powers of management of the affairs of the company subject to the superintendence, control and direction of the Board in question. A Whole-time Director includes a Director who is in the whole-time employment of the company, devotes his whole-time of working hours to the company in question and has a significant personal interest in the company as his source of income.

Every public company and private company, which is a subsidiary of a public company, having a share capital of more than Five Crore rupees (Rs. 5,00,00,000/-) must have a Managing or Whole-time Director or a Manager.

Further classification of Directors

Based on the circumstances surrounding their appointment, the

Companies Act recognizes the following further types of Directors:

- 1. First Directors:** *Subject to any regulations in the Articles of a company, the subscribers to the Memorandum of Association, or the company's charter or constitution ("Memorandum"), shall be deemed to be the Directors of the*

company, until such time when Directors are duly appointed in the annual general meeting (“AGM”).

2. Casual vacancies: Where a Director appointed at the AGM vacates office before his or her term of office expires in the normal course, the resulting vacancy may, subject to the Articles, be filled by the Board. Such person so appointed shall hold office up to the time which the Director who vacated office would have held office if he or she had not so vacated such office.

3. Additional Directors: If the Articles specifically so provide or enable, the Board has the discretion, where it feels it necessary and expedient, to appoint Additional Directors who will hold office until the next AGM. However, the number of Directors and Additional Directors together shall not exceed the maximum strength fixed in the Articles for the Board.

4. Alternate Director: If so authorized by the Articles or by a resolution passed by the company in general meeting, the Board may appoint an Alternate Director to act for a Director (“Original Director”), who is absent for whatever reason for a minimum period of three months from the State in which the meetings of the Board are ordinarily held. Such Alternate Director will hold office until such period that the Original Director would have held his or her office. However, any provision for automatic re-appointment of retiring Directors applies to the Original Director and not to the Alternate Director.

5. ‘Shadow’ Director: A person, who is not appointed to the Board, but on whose directions the Board is accustomed to act, is liable as a Director of the company, unless he or she is giving advice in his or her professional capacity. Thus, such a ‘shadow’ Director may be treated as an ‘officer in default’ under the Companies Act.

6. De facto Director: Where a person who is not actually appointed as a Director, but acts as a Director and is held out by the company as such, such person is considered as a de facto Director. Unlike a ‘shadow’ Director, a de facto Director purports to act, and is seen to the outside world as

acting, as a Director of the company. Such a de facto Director is liable as a Director under the Companies Act.

7. Rotational Directors: At least two-thirds of the Directors of a public company or of a private company subsidiary of a public company have to retire by rotation and the term “rotational Director” refers to such Directors who have to retire (and may, subject to the Articles, be eligible for re-appointment) at the end of his or her tenure.

8. Nominee Directors: They can be appointed by certain shareholders, third parties through contracts, lending public financial institutions or banks, or by the Central Government in case of oppression or mismanagement. The extent of a nominee Director's rights and the scope of supervision by the shareholders, is contained in the contract that enables such appointments, or (as appropriate) the relevant statutes applicable to such public financial institution or bank. However, nominee Directors must be particularly careful not to act only in the interests of their nominators, but must act in the best interests of the company and its shareholders as a whole.

The fixing of liabilities on nominee Directors in India does not turn on the circumstances of their appointment or, indeed, who nominated them as Directors. Chapter 4 and Chapter 5 that follow set out certain duties and liabilities that apply to, or can be affixed on, Directors in general. Whether nominee Directors are required by law to discharge such duties or bear such liabilities will depend on the application of the legal provisions in question, the fiduciary duties involved and whether such nominee Director is to be regarded as being in control or in charge of the company and its activities. This determination ultimately turns on the specific facts and circumstances involved in each case.

B. Classification under the Listing Agreement

The Securities Contracts (Regulation) Act, 1956, read with the rules and regulations made thereunder, requires every company desirous of listing its shares on a recognized Indian stock exchange, to execute a listing agreement (“Agreement”) with such Indian stock exchange. This

Agreement is in a standard format (prescribed by the Securities Exchange Board of India (“SEBI”)), as amended by SEBI from time to time. The Agreement provides for the following further categories of Directors:

Categories under Listing Agreement

1. Executive Director;
2. Non-executive Director; and
3. Independent Director.

Executive and non-executive Directors

An Executive Director can be either a Whole-time Director of the company (i.e, one who devotes his whole time of working hours to the company and has a significant personal interest in the company as his source of income), or a Managing Director (i.e, one who is employed by the company as such and has substantial powers of management over the affairs of the company subject to the superintendence, direction and control of the Board). In contrast, a non-executive Director is a Director who is neither a Whole-time Director nor a Managing Director. Clause 49 of the Agreement prescribes that the Board shall have an optimum combination of executive and non-executive Directors, with not less than fifty percent (50%) of the Board comprising non-executive Directors. Where the Chairman of the Board is a non-executive Director, at least one-third of the Board should comprise independent Directors and in case he is an executive Director, at least half of the Board should comprise independent Directors. Where the non-executive Chairman is a promoter of the company or is related to any promoter or person occupying management positions at the Board level or at one level below the Board, at least one-half of the Board of the company shall consist of independent Directors.

Independent Directors

The Agreement defines an “Independent Director” as a non-executive Director of the company who:

- a. apart from receiving Director's remuneration, does not have material pecuniary relationships or transactions with the company, its promoters, its Directors, its senior

management, or its holding company, its subsidiaries, and associates which may affect independence of the Director;

b. is not related to promoters or persons occupying management positions at the board level or at one level below the board;

c. has not been an executive of the company in the immediately preceding three (3) financial years;

d. is not a partner or an executive or was not a partner or an executive during the preceding three (3) years, of any of the following:

i. the statutory audit firm or the internal audit firm that is associated with the company, and

ii. the legal firms and consulting firms that have a material association with the company;

e. is not a material supplier, service provider or customer or a lessor or lessee of the company, which may affect the independence of the Director; or

f. he is not a substantial shareholder of the company, i.e, owning two percent (2%) or more of the block of voting shares; and

g. he is not less than twenty-one (21) years of age. Nominee directors appointed by an institution that has invested in, or lent money to, the company are also treated as independent Directors.”

15. Merely because the petitioner is the Director of Sequoia India Investment Holding which finances Vasan Health Care and by virtue thereof is a nominee independent director of Vasan Health Care, he cannot be held to be responsible for the day-to-day affairs of Vasan Health Care. Even otherwise the contentions now raised during the course of arguments and in the reply affidavits are not part of the complaints. In the complaints it is merely stated that accused No. 2 to 8 are the directors of the company and have been actively participating in day-to-day affairs of the company and take all the decisions for the company. Admittedly, the petitioner is not the Managing Director of Vasan Health Care nor the signatory to the cheque. He is also not the person responsible for day-to-day functioning

of Vasan Health Care. No vicarious liability can be fastened on the petitioner in the absence of specific role being attributed to the petitioner.”,

to contend that no vicarious liability can be fastened on the petitioner in the absence of a specific role being attributed to the petitioner in the complaint even after it had been specified by the accused no.1 in the reply to the legal notice that the petitioner had no role to play in the day to day affairs of the accused no.1 company.

16. Reliance was also placed on behalf of the petitioner on a catena of verdicts to contend to the effect that in the absence of specific averments in relation to the specific role attributed against the petitioner, merely making a bald cursory statement that the petitioner was incharge and responsible for the day to day affairs of the company, does not suffice to make the petitioner vicariously liable for dishonouring of the cheques not signed by him and there being nothing spelt out in the complaint to show the specific role attributed against him. Reliance in relation thereto, was thus placed on the verdicts of the Hon’ble Supreme Court in “*National Small Industries Corporation Limited V. Harmeet Singh Paintal & Anr.*” (2010) 3 SCC 330 with specific reference to paragraphs 12, 13, 14, 15, 22, 38 & 39 which read to the effect:-

“12. It is very clear from the above provision that what is required is that the persons who are sought to be made vicariously liable for a criminal offence under Section 141 should be, 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. Every person

connected with the company shall not fall within the ambit of the provision. 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. It follows from the fact 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 for a criminal offence under the provisions. The liability arises from being in charge of and responsible for the conduct of the 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.

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.

15. In a catena of decisions, this Court has held that for making Directors liable for the offences committed by the company under Section 141 of the Act, there must be specific averments against the Directors, showing as to

how and in what manner the Directors were responsible for the conduct of the business of the company.

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22. Therefore, this Court has distinguished the case of persons who are in charge of and responsible for the conduct of the business of the company at the time of the offence and the persons who are merely holding the post in a company and are not in charge of and responsible for the conduct of the business of the company. Further, in order to fasten the vicarious liability in accordance with Section 141, the averment as to the role of the Directors concerned should be specific. The description should be clear and there should be some unambiguous allegations as to how the Directors concerned were alleged to be in charge of and were responsible for the conduct and affairs of the company.

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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.

39. From the above discussion, the following principles emerge:

- (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 the accused therein vicariously liable for offence committed by the company along with averments in the petition containing that the 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 the accused is a Managing Director or a 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 the 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 the 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.”,

on the verdict of the Hon’ble Supreme Court in “**S.M.S. Pharmaceuticals Ltd. V. Neeta Bhalla and Anr.**” (2007) 4 SCC 70 with specific reference to paragraphs 10 & 20, which read to the effect:-

“10. Having regard to the importance of the questions, the matter was referred to a three-Judge Bench of this Court. Upon noticing the rival contentions of the parties as also the precedents operating in the field, the questions were answered by the larger Bench in the following terms:

“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.”

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20. The liability of a Director must be determined on the date on which the offence is committed. Only because Respondent 1 herein was a party to a purported resolution dated 15-2-1995 by itself does not lead to an inference that she was actively associated with the management of the affairs of the Company. This Court in this case has categorically held that there may be a large number of Directors but some of them may not associate themselves in the management of the day-to-day affairs of the Company and, thus, are not responsible for the conduct of the business of the Company. The averments must state that the person who is vicariously liable for commission of the offence of the Company both was in charge of and was responsible for the conduct of the business of the Company. Requirements laid down therein must be read conjointly and not disjunctively. When a legal fiction is raised, the ingredients therefore must be satisfied.”,

and on the verdict of this Court in “*Anoop Jhalani V. State and Anr.*” 2007 SCC OnLine Del 1293 with specific reference to paragraph 21, which reads to the effect:-

“21. It is apparent that with reference to the use of expression ‘as such’ the Hon’ble Supreme Court held that it amounted to a presumption drawn by the complainant and not a positive statement that the concerned director was in charge of and responsible for the conduct of the business of the company.”;

in “*Suresh Jindal V. State and Anr.*” 2008 SCC OnLine Del 1181 with specific reference to paragraphs 12 & 17, which read to the effect:-

“12. It is not in dispute that the cheque for a sum of Rs. 1 lac which is the basis of the complaint in question was issued by late Shri Ramesh Chand Jindal and photo-copy of the same as placed on record clearly shows that the same was not issued by Mr. Ramesh Chand Jindal in his capacity as a Director of the company. There is no seal of the company on the photo-copy of the said cheque and the account number as indicated in the cheque coincides with the account number given on the photo-copy of the saving bank pass book of Mr. Ramesh Chand Jindal. Evidently, the said cheque was issued by Mr. Ramesh Chand Jindal from his personal saving account and not from the account of the company i.e. M/s. AAR EM Alloys (P) Ltd. It is also not in dispute that legal notice, photo-copy of which has been placed on record was not issued by the respondent No. 2 against the said company. The same was sent in the name of the petitioner as well as Mr. Ramesh Chand Jindal without even disclosing their designation or status in the said company. Even in the said complaint case filed by the respondent No. 2, it has wrongly been stated that the cheque was prepared and signed by the accused No. 2 (Mr. Suresh Jindal) as a Director of accused No. 3 (Company), whereas, the fact not in dispute is that the cheque was issued by the accused No. 1 (Mr. Ramesh Chand

Jindal) and that too in his individual capacity. Nowhere in the complaint any averment has been made by respondent No. 2 as to how that petitioner is liable or responsible for the said dishonour of the cheque. It is no more res Integra that for fastening vicarious liability on the Director of the company or against any other person necessary averment has to be made in the complaint to show as to when and how at the time the offence was committed such a person was in charge of and was responsible to the company for the conduct or the business of the company as per the mandate of Section 141 of the N.I. Act and in the absence of such an averment the complaint against such a Director cannot be held to be maintainable. In this regard in N.K. Wahi v. Shekhar Singh, (2007) 9 SCC 481, the Hon'ble Apex Court observed as under:

8. To launch a prosecution, therefore, against the alleged Directors there must be a specific allegation in the complaint as to the part played by them in the transaction. There should be clear and unambiguous allegation as to how the Directors are in charge of and responsible for the conduct of the business of the company. The description should be clear. It is true that precise words from the provisions of the Act need not be reproduced and the Court can always come to a conclusion in facts of each case. But still, in the absence of any averment or specific evidence the net result would be that complaint would not be entertainable.

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17. The said legal position stands crystallized in the above case and also in the other judgments cited by the Counsel for the petitioner, therefore, the same need not be dealt with separately. Adverting back to the complaint case filed by respondent No. 2, it is clearly borne out that the cheque in question was signed by late Mr. Ramesh Chand Jindal in his individual and personal capacity from his saving bank account and therefore, the cheque not being drawn by Mr.

Ramesh Chand Jindal either in his capacity as a Director of the company or in any other capacity to represent the interest of the company, the present petitioner who although might have been a Director of the company in whose favour the loan was advanced, cannot be made liable to face the criminal prosecution. Indisputably, the company is the principal offender and the Director becomes automatically liable due to the legal fiction created under Section 141, N.I. Act. For holding a person vicariously liable for an offence of which the principal accused is the company, it is essential that the incriminating act was done by him. When the petitioner was neither signatory to the cheques nor there is any averment to the effect that he was in charge of the day-to-day affairs of the firm, I do not find any reason for sustenance of the complainant against him. It is a trite law that criminal prosecution puts a person to a great harassment besides causing damage to ones esteem, therefore, the same cannot be resorted to unless the allegations made in the complaint disclose the commission of offence on the part of a person being impleaded in the case. Even in the legal notice sent by respondent No. 2, the company was not put to notice nor anywhere in the complaint it has been disclosed that the present petitioner was in charge and responsible for the conduct of the business of the company and therefore in the absence of such an averment the complaint case filed by the respondent No. 2 cannot be held to be maintainable against the petitioner. The other irony of the case is that the person who is a drawer and signatory of the cheque in question has already died during the pendency of the case and due to that the complaint filed by the respondent No. 2 even cannot sustain against the deceased person as the liability of the criminal prosecution cannot be transferred upon the legal heirs of the deceased.”,

on the verdict of the Hon'ble Supreme Court in “*Anita Malhotra V.Apparel Export Promotion Council and Anr.*” (2012) 1 SCC 520

with specific reference to paragraph 22 thereof, which reads to the effect:-

“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.”,

on the verdict of this Court in “*Bikash Chakrborty V. Reliance Structure Pvt. Ltd.*” 2012 SCC OnLine Del 1173 with specific reference to paragraphs 8 & 9, which read to the effect:-

“8. Accused no. 1 is the company, accused no. 2, 4 and 5 are the present petitioners and accused no. 3 is the Managing Director, who admittedly had signed the cheques in question on behalf of the company. With regard to the liability of the Managing Director, there was no dispute that he was incharge and responsible to the conduct of affairs of company. There is also no dispute with regard to the fact that petitioner no. 1 who was arrayed as accused no. 5 was an employee and accused no. 2 and 3 are the directors of the company.

From the averments as leveled against the petitioners as noted above in the complaint, it cannot be said that the acts committed by them would sufficiently make out the petitioners herein to be vicariously liable. In order to fasten the vicarious liability on the petitioners in accordance with the provisions of Section 141 of the Act, the averments as to the role of the concerned employees and directors has to be specific. The description should be clear and there should be some unambiguous allegations as to how the concerned employees and directors were alleged to be incharge and responsible for the conduct of the affairs of the company. It is trite that so far as the company is concerned, if any offence is committed by it, then all other persons who are its directors or employees cannot be made vicariously liable. Only such person would be held liable if at the time when the offence is committed, he was incharge and responsible to the conduct of the business and affairs of the company. Merely being a director or employee of the company in absence of above factors will not make them liable. There being no specific averment attributing specific role describing the manner as to how the petitioners were incharge and responsible to the conduct of business affairs of the company, they could not be made liable for the offences alleged to have been committed by the company or the managing director.

9. The plea that the respondent/complainant was not aware as to the specific role and duties of the petitioners in the company that being their internal affair, was misconceived. Each and every director or employee of the company cannot be made liable vicariously for the offence committed by the company. As noted above, there was to be specific averment attributing liability of each person sought to be made liable for the company. If the respondent intended to make such employee or director of the company to be liable, he need specifically aver as to how and in what matter they were, according to him in charge and responsible to the conduct and affairs of the

company. Mere vague allegations can make such a person liable for criminal acts. Similarly, the plea that it was a unanimous decision of all, is also vague and unfounded in the absence of there being any role attributing to any of the petitioners in the conduct of day to day business of the company. The petitioners cannot be made to suffer the agony of criminal trial without there being any specific role in the involvement of the commission of the offence.”

on the verdict of the Hon’ble Supreme Court in “*Pooja Ravinder Devidasani V. State of Maharashtra and Anr.*” (2014) 16 SCC 1 with specific reference to paragraphs 17 & 27, which read to the effect:-

“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 Corp. [National Small Industries Corp. 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)

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27. Unfortunately, the High Court did not deal the issue in a proper perspective and committed error in dismissing the writ petitions by holding that in the complaints filed by Respondent 2, specific averments were made against the appellant. But on the contrary, taking the complaint as a

whole, it can be inferred that in the entire complaint, no specific role is attributed to the appellant in the commission of offence. It is settled law that to attract a case under Section 141 of the NI Act a specific role must have been played by a Director of the company for fastening vicarious liability. But in this case, the appellant was neither a Director of the accused Company nor in charge of or involved in the day-to-day affairs of the Company at the time of commission of the alleged offence. There is not even a whisper or shred of evidence on record to show that there is any act committed by the appellant from which a reasonable inference can be drawn that the appellant could be vicariously held liable for the offence with which she is charged.”

17. On a consideration of the rival submissions made on behalf of either side, it is essential to observe that the facts of the instant case are in *pari materia* to the facts of the cases relied upon on behalf of the petitioner in “*Bhardwaj Thuiruvenkata Venkatavraghavan*” (supra) and in “*Kanarath Payattiyath Balraj*” (supra). This is so, in as much as, though the respondent vide para 3 of its complaint has contended that the accused no.6 to the complaint was a whole time Director and incharge and responsible for the conduct of the day to day business of the accused company, the petitioner has placed on record the copy of Form-32 in relation to M/s Dinesh Oil Pvt. Ltd. i.e. in relation to the accused no.1, which gives the Director Identification Number (DIN) of the petitioner herein namely Har Sarup Bhasin with his Director Identification Number (DIN) being 06390155, which shows his appointment as Additional Director falling in the category of an Independent and a Non-Executive Director.

18. In these circumstances, in view of Section 149(12) of the Companies Act, 2013 which provides to the effect:-

“149. Company to have Board of Directors.—

....

.....

(12) Notwithstanding anything contained in this Act,—

(i) an independent director;

(ii) a non-executive director not being promoter or key managerial personnel,

shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently.

.....”,

as laid down by this Court in “***Bhardwaj Thuiruvenkata Venkatavraghavan***” (supra) and “***Kanarath Payattiyath Balraj***” (supra), the petitioner being an Independent and a Non-Executive Director, in the absence of any specific role attributed against the petitioner for his active participation in the day to day affairs of the company and of taking all decisions of the company, where the petitioner was not a signatory to the cheques in question, vicarious liability cannot be fastened on the petitioner in the absence of any specific role attributed to him, in as much as, the contentions that have been sought to be raised during the course of the arguments and in the affidavit in reply to the petition on behalf of the respondent in relation

to the petitioner being in a Key Managerial Person and the petitioner having participated in 100% all the meetings of the accused company, are not spelt out in the complaint that had been filed by the respondent. Furthermore, taking into account also the factum that even if the petitioner was a Key Managerial Person of the accused No.1 company as per the reply affidavit of the respondent as filed on 08.07.2007, he was so for the period from 01.04.2015 to 31.03.2016 and the date of the drawing of the cheques in question are 07.06.2016.

19. In view thereof, the impugned order dated 20.02.2017 of the Trial Court of the learned MM-01, New Delhi in CC No.45438/2016 to the extent that summons are issued to the petitioner for an alleged commission of an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 is thus, quashed.

20. The petition is disposed of accordingly.

 **ANU MALHOTRA, J.**

JANUARY 07, 2020/NC

