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

% **Date of decision: 16.10.2020**

\+ CRL.M.C. 708/2020 & CRL.M.A. 2910/2020 & 2912/2020

SMT. DHARNA GOYAL @ DHARNA GARG ..... Petitioner
Through: Ms. Sahiba Singh, Advocate

versus

M/S. ARYAN INFRATECH PVT. LTD. ..... Respondent
Through:

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J. (ORAL)

1. Present petition has been filed by the Petitioner for quashing the summoning order dated 28.11.2016 and the complaint bearing CC No. 6573/2017 filed by the Respondent against the Petitioner under Sections 138/141/142 of the Negotiable Instruments Act (hereinafter referred to as 'NIA') as well as all further proceedings emanating therefrom including the order dated 04.12.2019 passed by the Special Judge NDPS in Criminal Revision bearing CR No. 114/2019 titled as Dharna Goyal v. M/s Aryan Infratech Pvt. Ltd.

2. Brief facts shorn of unnecessary details are that a complaint was filed by the Respondent against M/s Ringing Bells Pvt. Ltd., Accused No. 1 and five other Accused persons including the Petitioner herein under Sections 138/141/142 of the NIA. It was alleged in the complaint that in discharge of legal liability, Accused No. 1 issued a cheque bearing No.

731759 dated 28.10.2016 for an amount of Rs. 2 crores, duly signed by Accused No.2, with the consent and knowledge of the other Co-accused including the Petitioner and that the same was dishonoured on presentation. A legal notice of demand dated 02.11.2016 was sent on 04.11.2016 by the complainant but despite the receipt of the notice the Accused persons failed to remit the alleged outstanding amount. On the filing of the complaint, the Trial Court summoned the Accused including the Petitioner. The Petitioner herein has been arrayed as Accused No.5 in the capacity of CEO of Accused No.1 Company.

3. As per the Petitioner, she received the summons for the first time on 10.01.2019 and immediately thereafter preferred a Criminal Revision bearing CR No.114/2019 on 28.02.2019, challenging the summoning order. On 25.03.2019 the Sessions Court issued notice to the Respondent and the Petitioner took repeated steps to effect service on the Respondent through his counsel before the Trial Court. However, none appeared on behalf of the Respondent. Vide order dated 04.12.2019 the Sessions Court dismissed the Revision petition and the Petitioner approached this Court.

4. It needs to be mentioned that vide order dated 08.06.2020 this Court after capturing the controversy involved issued notice to the Respondent, returnable on 06.07.2020. When the petition was listed on 06.07.2020 counsel for the Petitioner submitted that she had served the Respondent through the electronic mode and sought time to place on record an affidavit to that effect. Report of the Registry regarding service on the Respondent through other permissible modes was not on record and the Registry was directed to place the same on record. When the petition was listed on 16.07.2020, the Report of the Registry, placed on

record, indicated that the Respondent had been served through e-mail. Counsel for the Petitioner also submitted that the notice sent at the registered e-mail address of the complainant, available in the records of the Ministry of Corporate Affairs, had not bounced back and was therefore deemed to have been received. Although no one appeared for the Respondent, no adverse orders were passed by the Court. Counsel for the Petitioner undertook to inform the counsel for the complainant appearing before the Trial Court, on the next date of hearing, fixed before the Trial Court as well as to send a letter of intimation, through speed post.

5. On the next date of hearing also there was no appearance on behalf of the Respondent, despite having been served, as evident from the affidavit of service. The matter was called twice and finally in the interest of justice the petition was again adjourned for 30.09.2020. Even on 30.09.2020 none appeared for the Respondent and the petition was finally adjourned for today. Once again, the matter was passed over for hearing at the end of the board, but none appeared to represent the Respondent, on both the calls.

6. The foremost issue that arises before the Court is whether the complaint and the summons can be quashed qua the Petitioner in the absence of the complainant. The said issue is settled and the law on this is no longer *res integra*. A similar situation had arisen in the case of ***Lafarge Aggregates & Concrete India P. Ltd. vs. Sukarsh Azad & Ors. (2014) 13 SCC 779*** decided by the Supreme Court on 10.09.2013. In the said case the Respondents were the Directors in the Company at whose instance the High Court had quashed the complaint lodged by the

Appellant under Section 138 of NIA. The High Court allowed the petition filed under Section 482 Cr.P.C. and quashed the proceedings, but the order was ex-parte. The Appellant filed an application for recall of the order but the same was dismissed on the ground that it did not meet the test laid down in ***N.K. Wahi vs. Shekhar Singh & Ors. 2007 (9) SCC 481.*** The Supreme Court in an Appeal filed by the Appellant upheld the order of the High Court and dismissed the Appeal.

7. Similarly, in Crl. Petition Nos. 8510 & 8511/2015 titled ***Renuka Ramnath & Ors. vs. Hasham Investment and Trading Company Pvt. Ltd. decided on 01.02.2019***, High Court of Karnataka while dealing with petitions under Section 482 Cr.PC for quashing the proceedings initiated against the Petitioners on a complaint under Section 138 NIA proceeded ex-parte against the complainant, when the complainant chose to be unrepresented, despite being duly served.

8. Following these judgements, it is clear that in case the complainant chooses not to appear and contest the petition, despite being served, Court can proceed ex-parte and hear the Accused in a petition filed under Section 482 Cr.P.C. for quashing.

9. Record indicates that Respondent has been duly served, and has due intimation of the listing of the petition, but has chosen not to contest the petition, despite ample opportunities to defend. In the circumstances the Respondent is proceeded ex-parte and the petition is heard on merits.

10. Learned counsel for the Petitioner contends that the Petitioner had resigned from Accused No. 1 Company with effect from 15.06.2016, whereas the cheque in question was issued on 28.10.2016 and was dis-

honoured on presentation on 29.10.2016. The legal notice of demand was sent by the Respondent allegedly on 02.11.2016. In support of the resignation of the Petitioner, counsel has drawn the attention of the Court to Form No. DIR-11 issued under Proviso to Section 168(1) of the Companies Act, 2013 and Rule 18 of the Companies (Appointment and Qualifications of Directors) Rules 2014. Thus, the Petitioner, it is contended, undisputedly was in no manner responsible for or associated with the affairs of the Company in any manner on the date the alleged offence was committed by the Company. For any alleged acts of omission and/or commission by the Company, after the resignation of the Petitioner, she cannot be made responsible. Learned counsel submits that this legal proposition stands settled by the judgement of the Supreme Court in ***Harshendra Kumar D. vs. Rebatilata Koley & Ors. (2011) 3 SCC 351*** which was followed by this Court in ***Kamal Goyal vs. United Phosphorus Ltd.***, ***M.L. Gupta & Ors. vs. DCM Financial Services Ltd. 167 (2010) DLT 428*** and a recent judgement of this Court in ***Crl.M.C. 1602/2020 titled Alibaba Nabibasha vs. Small Farmers Agri-Business Consortium & Ors. decided on 23.09.2020***.

11. The next contention of Ms. Sahiba Singh learned counsel for the Petitioner is that the said cheque was neither signed nor issued by the Petitioner and no consent to issue the same was or could have been given by the Petitioner to the co-accused, as she had resigned on 15.06.2016. She submits that an ex-official/ex-director cannot be held liable for the alleged acts of the Company, after the resignation, merely because of the past position or association with the Accused Company. In ***DCM Financial Services Ltd. vs. J.N. Sareen & Ors. AIR 2008 SC 2255***,

Supreme Court has clearly enunciated this law and has also observed that only those officials of the Accused Company can be held liable under Section 141 of NIA who are associated with or responsible for the affairs of the Company, at the relevant time.

12. The third contention of the learned counsel is that there are no specific/unambiguous/clear allegations qua the role of the Petitioner in the complaint and most significantly the complainant has not even made a whisper as to the transaction pursuant to which the cheque was issued, which is a mandatory requirement under Section 141 of NIA. A bare perusal of the complaint indicates that it does not mention anywhere that the Petitioner was responsible for managing the affairs of the Company at the relevant time and the complaint is completely vague. In this regard reliance is placed on the judgement of this Court in ***Shivom Minerals Limited & Ors. vs. State & Ors. 2019 SCC OnLine Del 9329***.

13. To elaborate the argument, it is submitted that the Courts have repeatedly affirmed that mere fact of being a Director is not enough and there must be specific allegations to make out a case against the Accused under Sections 138 and 141 of NIA. This according to the counsel has been so observed in the judgements in ***S.M.S. Pharmaceuticals Ltd. vs. Neeta Bhalla & Ors. (2005) 8 SCC 89*** and ***Sudeep Jain vs. M/s. ECE Industries Ltd. 2013 SCC OnLine Del 1804***.

14. Last but not the least learned counsel also argues that the complainant is a Company and a separate legal entity from its Directors. Ms. Sahiba points out to a Notification dated 08.08.2018 issued by the Office of Registrar of Companies published under Section 248(5) of the Companies Act, 2013 wherein a list of Companies has been published,

which have been struck off from the Register of the Companies, as they stand dissolved. She draws the attention of the Court to seriatim 2033 where the name of the Respondent figures. The argument is that once the complainant Company has been dissolved, further prosecution cannot be continued as the complainant is no longer in existence.

15. I have heard the learned counsel for the Petitioner and examined her contentions.

16. There is force in the contention of counsel for the Petitioner that since the Petitioner had resigned on 15.06.2016 and was no longer responsible for the conduct of business of Accused No. 1 Company, on the date of the commission of the alleged offence, she cannot be arrayed as an Accused in the proceedings emanating out of the complaint referred to above. Form No. DIR-11 clearly evidences the resignation of the Petitioner on 15.06.2016 and the cheque in question is admittedly issued on 28.10.2016, which is post her resignation. It cannot therefore be said that the Petitioner was in-charge of and responsible for the conduct of day to day business/affairs of the Company, as contemplated in Section 141 of the NIA for being proceeded against.

17. There is also merit in the contention of the Petitioner that the provisions of Section 141 require that there must be specific and necessary averments in the complaint regarding the nature of transactions between the parties and a complaint cannot be maintained on mere sketchy averments/allegations.

18. At this stage it is necessary to refer to Sections 138 and 141 of the NIA which are as follows:-

*"**138. Dishonour of cheque for insufficiency, etc., of funds in the account**.—Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for [a term which may extend to two years], or with fine which may extend to twice the amount of the cheque, or with both:*

Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;*

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [69][within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

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

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

*"**141. Offences by companies**.—(1) If the person committing an offence under Section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:*

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

[Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this chapter.]

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section,—

(a) "company" means any body corporate and includes a firm or other association of individuals; and

> *(b) "director", in relation to a firm, means a partner in the firm."*

19. The provisions of these Sections were examined in the past in several judgements and therefore to avoid prolixity, I may usefully refer to some of them. 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 NIA, the Court observed as under:-

> *"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."*

20. The same view was reiterated by the Supreme Court in ***National Small Industries Corp. Ltd.* v. *Harmeet Singh Paintal*, 2010 (2) SCALE 372**, wherein it was observed that :

> *"24. ...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."*

21. The Supreme Court summarised and culled out the following principles shedding light on the legal position:-

> *"(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."

22. In this context relevant it would be to quote a few passages from the judgement of this Court in ***Sudeep Jain (supra)*** as under:-

"9. The prime objective of this Court is to remind all the Metropolitan Magistrates in Delhi to carefully scrutinize all the complaint cases being filed under Section 138 r/w 141 of the Negotiable Instruments Act, 1881 against the accused companies at the pre-summoning stage and make sure that notice be directed only to those directors or employees of the company who satisfy the principles laid down in the aforesaid judgments. Summons must be issued only after giving due consideration to the allegations and the materials placed on record by the complainant. Undeniably, as per the aforesaid legal pronouncements, Managing Director and the Joint Managing Director are deemed to be vicariously liable for the offence committed by the company because of the position they hold in the company. Problem arises in cases where all the persons holding office in the company are sought to be prosecuted by the complainant, irrespective of whether they played any specific role in the incriminating act. It is surprising to see that in plethora of cases, the complaint contains allegations even against those persons who might have been Directors at any point in time in the accused company, but had resigned from such company much prior to the period when the alleged offence was committed. Issuing summons to all persons named in the complaint mechanically, without ascertaining whether they played any actual role in the transaction, not only pesters the

innocent directors/employees named in the complaint, but also upsurges the load on the High Courts as the Magistrates once issuing the summoning orders against the accused, are precluded from reviewing their summoning orders in view of the decision of the Apex Court in Adalat Prasad v. Rooplal Jindal, (2004) 7 SCC 338. One can also not lose sight of the fact that once such innocent persons are summoned, they have no choice but to seek bail and face the ordeal of trial. Many of such persons also approach the High Court under Section 482 Cr.P.C. to seek quashing of the summoning order and the complaint filed against them and this further increases the burden on the already overburdened Courts.

10. With a view to ensure that the Metropolitan Magistrates dealing with the complaint cases filed under Section 138 r/w Section 141 of the Negotiable Instruments Act have a clear and complete picture of the persons arrayed by the complainant so as to hold them vicariously liable for the commission of the offence by the accused company, I am inclined to direct that the Magistrates must seek copies of Form-32 from the complainant to prima facie satisfy the Court as to who were the directors of the accused company at the time of commission of the alleged offence and on the date of filing of the complaint case. In addition to the above, the Magistrates must also seek information as given in the following table which is to be annexed by the Complainant on a separate sheet accompanying the complaint:-

a. Name of the accused Company;

b. Particulars of the dishonoured cheque/cheques;

• Person/Company in whose favour the cheque/cheques were issued

• Drawer of the cheque/cheques

• *Date of issuance of cheque/cheques*

• *Name of the drawer bank, its location*

• *Name of the drawee bank, its location*

• *Cheque No./Nos.*

• *Signatory of the cheque/cheques*

c. Reasons due to which the cheque/cheques were dishonoured;

d. Name and Designation of the persons sought to be vicariously liable for the commission of the offence by the accused Company and their exact role as to how and in what manner they were responsible for the commission of the alleged offence;

e. Particulars of the legal notice and status of its service;

f. Particulars of reply to the legal notice, if any."

23. Recently a Co-ordinate Bench of this Court in ***Alibaba Nabibasha (supra)*** following the judgements referred to above quashed the complaint pending before the Trial Court under Section 138 of the NIA including the summons and held as under:-

"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 & Ors. (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-today 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 more 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 more 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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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 judgement 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."

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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> *xxx xxx xxx*
>
> *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."*

24. I may allude to the judgement of Co-ordinate Bench of this Court in ***Shivam Minerals (supra)***, the relevant portion of which is as follows:-

> *"9. In the instant case, to assert the necessary ingredients of existing debt or liability, it is required to be averred in a complaint of Section 138 of NI Act, as to what is the factual basis to show existing debt or liability. All that has been said in the complaints in question and the pre-summoning evidence is as under:—*
>
> > *"3. That complainant and accused were known to each other and both parties had substantial business transactions and in lieu of the business correspondence and financial transactions complainant company had sent payments to accused persons through RTGS and in discharge of part liability towards complainant co. you accused no. 3 being the Director of accused no. 1 and in connivance, consent and knowledge of accused no. 2, 4 and 5 issued the following cheques in favour of my client as under:—*

CHEQUE NO.	*DATED*	*AMOUNT*	*DRAWN ON*
018110	*18-10-13*	*Rs. 10000000/-*	*IDBI BANK, BHUBNESHWAR, ORISSA-751022*
018111	*18-10-13*	*Rs. 10000000/-*	*-------DO-------*
014296	*17-10-13*	*Rs. 1,40,00000/-*	*-------DO-------*
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10. *In the absence of necessary averments in the complaints in question regarding the nature of transaction between the parties, complaints in question cannot be maintained on such sketchy averments as highlighted above. Such view was taken in a similar case by Supreme Court in 'Omniplast Private Limited (Supra) while concluding as under:—*

> *"That apart, as rightly pointed out by Mr. Divan, learned Senior Counsel, in the absence of necessary pleadings with particular details as regards the property based on which the transaction was stated to have been entered into between the appellant and M/s. A.D. Exports (P) Ltd. there is every justification in the stand of the respondents to doubt the full transaction as between the appellant and M/s. A.D. Exports (P) Ltd. More so, when a huge sum of Rs. 44,86,000 was stated to have been parted with by the said agreement holder to the appellant who agreed to hand over the possession along with the title deeds. Here again, we do not wish to go into the details of the said stand raised on behalf of the respondents but yet we only state that such a stand definitely creates very serious doubts about the whole transaction itself, especially when the sum of Rs. 44,86,000 covered by the pay order was returned by Respondent 1 Bank in*

> *order to comply with the attachment proceedings issued by the Income Tax Department".*
>
> ***11.*** *In light of the aforesaid factual and legal position, this Court is of the considered opinion that necessary ingredients to maintain the complaints in question are lacking, thereby rendering the impugned order unsustainable and so, continuance of proceedings arising out of the complaints in question would be an exercise in futility."*

25. Sections 138 & 141 of the NIA 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 NIA 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 fulfillment 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 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 and thus liable.

26. It is also a settled law that it is not enough to state in the complaint that a particular person was a Director, Managing Director, CEO or Secretary etc. of the Company. As held by the Supreme Court in ***SMS Pharmaceuticals (supra)*** it may be that in a given case, a person may be a Director but may not know anything 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. The Court observed that mere use of a particular designation of an Officer, without more, may not be enough, in a complaint, more particularly, when the requirement of Section 141 is that such a person should be in-charge of and responsible to the Company for conduct of its business. Liability is cast on person who may have something to do with the transactions complained of. Relevant paras of the judgement are as under:-

> *"7. As to what should be the averments in a complaint, assumes importance in view of the fact that, at the stage of issuance of process, the Magistrate will have before him only the complaint and the accompanying documents. A person who is sought to be made the accused has no right to produce any documents or evidence in defence at that stage. Even at the stage of framing of charge the accused has no such right and a Magistrate cannot be asked to look into the documents produced by an accused at that stage. (See State of Orissa v. Debendra Nath Padhi [(2005) 1 SCC 568 : 2005 SCC (Cri) 415] .)*
>
> *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."*

27. From the conspectus of the judgments referred to above, it emerges that each case would have to be examined on its own facts to ascertain the exact averments made in the complaint and useful would it be to refer to paras 13, 14 and 17 from ***SMS Pharmaceuticals (supra)*** which are as follows:-

> "***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.

***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."

28. Thus, there is unanimity in judicial opinion that necessary and specific averments ought to be mentioned in a complaint before a person is subjected to criminal prosecution and it is not enough if the person accused is/was the Director/CEO of a Company. It is the obligation of the Complainant to clearly and unambiguously aver that the person accused of the offence was in charge of the conduct of the business, ascribe a specific role to him/her before any criminal liability can be fastened. In the background of these judgements I may now examine the complaint in the present case, which is the genesis of the present proceedings.

29. Perusal of the complaint shows that the allegation of issuing the cheque is against accused No.1 from the account maintained by accused No. 1 and allegations of signing are against accused No. 2, as authorized signatory of accused No.1. The allegation against accused No. 5, who is the Petitioner herein, is that an assurance was given to the complainant that the cheque shall be honoured on presentation. Petitioner is stated to be the CEO of accused No.1 Company and the wife of accused No.2. It is averred that the cheque was issued with her consent and knowledge and she attended meetings with the official of the complainant and responsible for the business of the Company. What is significant is that in the entire complaint there is not even a whisper of the alleged transaction, pursuant to which the cheque was allegedly issued in favour of the complainant. All that is mentioned is 'towards the discharge of part of legal debts/liability' cheque was issued. There are no specific allegations or averments against the Petitioner regarding her alleged role either in the transaction or in the conduct of business of the Company. It is settled that mere designation of an officer in a Company is not enough to make the

officer vicariously liable. The absence of an averment as to the transaction / specific role of the Petitioner, in my opinion, is fatal to the case of the complainant. The most important factor that goes in favour of the Petitioner is that she had resigned from the Company w.e.f. 15.06.2016, which was before the cheque in question was even issued. Form No.DIR-11 placed on record substantiates the stand of the Petitioner. The authenticity of the Form is undisputed as the Respondent has failed to contest the matter, despite service, besides the fact that this is a public document.

30. It is relevant to note at this stage that it is not the case of the complainant that even after resigning as a CEO of accused No. 1 the Petitioner continued to be associated with the Company or was occupying any such position which made her in-charge and responsible for the conduct of its business. Vicarious liability has been imputed to the Petitioner solely on account of her being the CEO of accused No. 1. It is also not the case of the complainant that the cheque in question was dishonoured or the notice of demand was not complied with due to connivance of or with the consent of the Petitioner. The complainant has also not averred that even after resigning as CEO the Petitioner was in a position to have given instructions to the officers of the Company who were in-charge of the affairs of the Company, to ensure that the cheque when presented for encashment should be honoured. Therefore, the Petitioner is not even covered under Sub-Section (2) of Section 141 of the NIA.

31. For all the aforesaid reasons the summoning order dated 28.11.2016 along with the complaint bearing CC No. 6573/2017 filed

under Sections 138/141/142 of the NIA by the Respondent against the Petitioner pending before the Trial Court are quashed. Consequently, all proceedings emanating therefrom including the order dated 04.12.2019 passed by the Special Judge in Criminal Revision bearing CR No. 114/2019 are also quashed against the Petitioner.

32. The petition is accordingly allowed and all pending applications are disposed of.

JYOTI SINGH, J

OCTOBER 16, 2020
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