



2017 (0) AIJEL-HC 237438

GUJARAT HIGH COURT

Hon'ble Judges: J.B. Pardiwala, J.

Joginder Singh Juneja Versus State Of Gujarat

CRIMINAL MISC.APPLICATION No. 30195 of 2016 ;
CRIMINAL MISC.APPLICATION No. 30197 of 2016 ; *J.Date :- APRIL 19, 2017

- CODE OF CRIMINAL PROCEDURE, 1973 Section - 482
- NEGOTIABLE INSTRUMENTS ACT, 1881 Section - 138 , 141

Code of Criminal Procedure, 1973 - S. 482 - Negotiable Instruments Act, 1881 - S. 138, 141 - complaint of dishonour of cheque - quashing of criminal proceedings - applicants were serving as Directors of accused no. 1 company - vicarious liability - audit committee report - responsibility of Directors - specific averments in the complaint that applicants were responsible for the conduct of the business of the company - role and functions of the members of the audit committee noted - remuneration was also being paid to the applicants - every person who at the time of offence was committed is in charge of and responsible to the company shall be deemed to be guilty of the offence u/s 138 of NI Act - if basic averments in the complaint supported by evidence then the burden shift upon the accused to establish that he had nothing to do with the day to day affairs of the company - liberty given to the applicants to raise their defence during trial as to they were not responsible for the day today affairs of the company - no interference - applications dismissed.

Imp.Para: [14][15][16][17][18][22]

Cases Referred To :

1. A. K. Singhania V. Gujarat State Fertilizer Company Ltd., AIR 2014 SC 71
2. Anil Hada V. Indian Acrylic Ltd, 2001 1 SCC 1
3. Ashok Muthanna V. Exports Finance Ltd, 2001 2 Crimes 602
4. Girdhari Lal Gupta V. D.N. Mehta, 1971 3 SCC 189
5. Harshendra Kumar D. V. Rebatilata Koley Etc, 2011 0 CrLJ 1626
6. K.K. Ahuja V. V.K. Vora And Anr, 2009 10 SCC 48
7. K.P.G. Nair V. Jindal Menthol India Ltd., 2001 10 SCC 218
8. Katta Sujatha Vs. Fertiliser & Chemicals Travancore Ltd., 2002 7 SCC 655

9. Lok Housing Ad Constructions Ltd. V. Raghupati Leasing And Finance Ltd, 2003 115 CC 957
10. M:s. B.S.I. Ltd V. Gift Holdings Pvt Ltd, AIR 2000 SC 926
11. M:s. Pepsi Foods Ltd V. Special J.M., AIR 1998 SC 128
12. N.K. Wahi V. Shekhar Singh And Others, 2007 9 SCC 481
13. Om Prakash Agrawal V. State Of A.P., 2001 0 CrLJ 253
14. Pooja Ravinder Devidasani V. State Of Maharastra, AIR 2015 SC 675
15. R. Kanan V. Kotak Mahindra Finance Ltd., 2003 115 CC 321
16. S.M.S. Pharmaceuticals Ltd. V. Neeta Bhalla And Another, 2007 4 SCC 70
17. Sabitha Ramamurthy V. R.B.S. Channabasavaradhya, 2006 10 SCC 581
18. Saroj Kumar Poddar V. State (Nct Of Delhi) And Another, 2007 3 SCC 693
19. Secunderabad Health Care Ltd. V. Secunderabad Hospitals (P) Ltd., 1999 96 CC 106
20. State Of Haryana V. Brij Lal Mittal, 1998 5 SCC 343
21. State Of Karnataka V. Pratap Chand, 1981 2 SCC 335
22. Sunil Kumar Chhaparia V. Dakka Eshwaraiah, 2002 108 CC 687
23. Tamil Nadu News Print & Papers Ltd. V. D. Karunakar And Others, 2015 8 Scale 733
24. V. Sudheer Reddy V. State Of A.P., 2000 107 CC 107

Equivalent Citation(s):

2017 JX(Guj) 268 : 2017 AIJEL_HC 237438

JUDGMENT :-

J.B.PARDIWALA, J.

1 Since the issues raised in both the captioned applications are the same and the parties are also the same, those were heard analogously and are being disposed of by this common judgment and order.

2 For the same of convenience, the Criminal Miscellaneous Application No.30195 of 2016 is treated as the lead matter.

3 By this application under Section 482 of the Code of Criminal Procedure, 1973, the applicants - original accused Nos.4 and 5 seek to invoke the inherent powers of this Court, praying for quashing of the proceedings of the Criminal Case No.316 of 2016 pending in the Court of the learned Additional Chief Metropolitan Magistrate, Court No.36 at Ahmedabad arising from a complaint filed under Section 138 of the Negotiable Instruments Act.

4 The connected application is in connection with the Criminal Case No.315 of 2016 pending before the very same Court i.e. the Additional Chief Metropolitan Magistrate, Court No.36 at Ahmedabad arising from a complaint lodged under Section 138 of the Negotiable Instruments Act.

5 The applicants before me have been arraigned as accused in their capacity as the Directors of the accused No.1 company namely, 'Elder Pharmaceuticals Limited'. They are sought to be prosecuted for the offence punishable under Section 138 of the

Negotiable Instruments Act, by imposing vicarious liability under Section 141 of the Negotiable Instruments Act. The complaint filed by the respondent No.2 reads as under:

"3 That the Accused No.2 is the Managing Director of the Accused No.1, the Accused nos.4 to 6 are the Directors of the Accused no.1, the Accused no.7 is the Secretary of the Accused no.1. The said persons were in charge of and were responsible to the Accused No.1 for the conduct of the business of the Accused No.1, as well as the Accused No.1, at the time of commission of the present offence under section 138 of the Act (defined hereinbelow).

4 That the Complainant had upon the request of the Accused No.1 deposited Rs.3,00,000/(Rupees three lakhs only) with the Accused No.1 in and around 18.07.2013. The Accused No.1 promised to repay said deposit with interest, being a total sum of Rs.3,06,809/. In order to secure the said payment by the Accused no.1 to the Complainant, the Accused No.1 executed promissory note in favour of the Complainant having due date 16.09.2013, promising to pay Rs.3,06,809 to the Complainant. That the said arrangement entered into between the Complainant and the Accused No.1 is evidenced by letter dt. 18.07.2013 issued by the Accused No.1 to the Complainant and termed as 'Promissory Note Discounting Facility' therein. Hereto annexed and marked as Annexure A is a copy of the said letter dt. 18.07.2013 issued by the Accused No.1 to the Complainant. Hereto annexed and marked as Annexure B is a copy of the promissory note executed by the Accused no.1 in favour of the Complainant having due date 16.09.2013.

5 That the Accused No.1 in order to make payment as promised under the said promissory note issued cheques to the Complainant from time to time.

6 However, the Accused no.1 knowing that those cheques would bounce, at all times requested the Complainant not to deposit the same during its validity period, and instead, to make good its commitment under the said promissory note, would replace the older cheque with new one.

7 That the Accused no.1, to make payment under the said promissory note issued cheque drawn on ICICI bank, Nariman Point, Mumbai bearing No.030328 dated 31.03.2015 for Rs.3,06,809 (Rupees three lakhs six thousand eight hundred and nine only) in favour of the Complainant enclosed with letter dt. 11.09.2014. The Accused no.1 simultaneously sought return of all cheque(s) issued previously by the Accused no.1 to the Complainant to make the payment under the said promissory note. Hereto annexed and marked as Annexure C is a copy of the said cheque drawn on ICICI bank, Nariman Point, Mumbai bearing No.030328 dated 31.03.2015 for Rs.3,06,809 (Rupees three lakhs six thousand eight hundred and nine only) in favour of the Complainant. Hereto annexed and marked as Annexure D is a copy of the said letter dt. 11.09.2014 issued by the Accused No.1 to the complainant.

8 That the Complainant presented the above said cheque within the period of validity on 29.06.2015 for account of the Complainant though its banker, Union

Bank of India at its branch office located at C.G. Road, Ahmedabad, Gujarat. But the said cheque was received back unpaid with the remark "account closed".

9 That such intimation from the said bank was received by the complainant on 03.07.2015.

10 That the Complainant through its advocate and solicitor, issued statutory legal notice dated 27.07.2015 in accordance with section 138 of the Negotiable Instruments Act, 1881 (the "Act"), by registered post acknowledgment due to the Accused no.1 demanding therein payment of Rs.3,06,809 (Rupees three lakhs six thousand eight hundred and nine only) within 15 days of the receipt of such notice. The above notice of demand was received by the Accused no.1 on 31.07.2015. Hereto annexed and marked as Annexure E is a copy of the said statutory legal notice dt. 27.07.2015 issued by the Complainant with section 138 of the Negotiable Instruments Act, 1881. That the copy of the acknowledgment due card was not returned to the address of the said advocate. However, the said statutory notice was delivered to the aforesaid address of the of the Accused No.1 on 31.07.2015. The same is evidence from the report generated on the website of the India Post. Hereto annexed and marked as Annexure F is a copy of the said report evidencing delivery of the said statutory notice on 31.07.2015.

11 That the accused failed to make payment of the said cheque with the time set out in the said statutory notice.

12 That the Accused no.1 has instead issued a frivolous and false reply dt. 17.08.2015, through its advocate, denying knowledge of the transaction with the Complainant due to change of management of the Accused no.1. The Accused no.1 being a public limited company, a perpetual entity and an ongoing concern, it is denied that the said transaction with the Accused no.1 would not be within the knowledge of the Accused no.1 due to change in management of the Accused no.1. Hereto annexed and marked as Annexure G is copy of the reply dt. 17.08.2015 issued by the Accused no.1 to the Complainant.

13 That as a matter of good faith, the Complainant provided to the Accused no.1 copies of the relevant documents in relation to the said transaction entered into between the Complainant and the Accused no.1 vide letter dt. 28.08.2015 issued through its advocate. Hereto annexed and marked as Annexure H is a copy of the letter dt. 28.08.2015 issued by the Complainant to the Accused no.1 through its advocate.

14 However, the Accused no.1 having failed to pay the amount of the said cheque within 15 days of receipt of the said statutory notice, has committed the offence under section 138 of the Act. Further, the Accused nos.2 to 6, being persons in charge of, and responsible to the Accused No.1 for the conduct of the business of the Accused No.1, as well as the Accused No.1, at the time of commission of the offence, are guilty for offence committed under section 136 read with section 141 of the Act.

15 That the Accused dishonestly and fraudulently induced the Complainant to deposit sum of Rs.3,00,000/with the Accused no.1 with the promise to repay the same alongwith interest being a total of Rs.3,06,809/to the Complainant and the accused persons dishonestly issued the said cheque to and in favour of the Complainant which the accused persons knew that on presentation would never be honoured. Had the Complainant known that the accused persons had no intention to repay the said deposit alongwith interest, the Complainant would have never agreed to make the said deposit with the Accused no.1. 16 That the accused persons have committed offence punishable under section 138 read with sections 141/142 of the Act and for which they are liable to be prosecuted and punished, hence the complaint to this Hon'ble Court."

6 The principal argument of Mr. I.H. Syed, the learned counsel appearing for the applicants is that his clients were non-executive and independent Directors of the company. They had nothing to do with the day-today affairs and the management of the company. They cannot be held vicariously liable by virtue of Section 141 of the Negotiable Instruments Act. The learned counsel would submit that mere verbatim reproduction of the words are not sufficient to fasten the applicants with the vicarious liability under Section 141 of the Negotiable Instruments Act. It is submitted that over and above the averments made in the complaints, the complainant is obliged to place on record in the form of some materials to substantiate the say that the applicants were in the day-today affairs and management of the company at the time of the commission of the offence.

7 In such circumstances referred to above, Mr. Syed prays that there being merit in both the applications, the same be allowed and the proceedings be quashed so far as the two applicants are concerned.

8 On the other hand, both the applications have been vehemently opposed by Mr. Arjun Sheth, the learned counsel appearing for the respondent No.2 - original complainant.

9 Ms. Pathak, the learned Additional Public Prosecutor has appeared on behalf of the State of Gujarat.

10 Mr. Sheth would submit that the averments made in the complaint are sufficient at this stage to fasten the applicants with the vicarious liability under Section 141 of the Negotiable Instruments Act. Mr. Sheth pointed out that the two applicants herein were members of the audit committee. They were included in the audit committee as members, as they possess financial and accounting knowledge. Mr. Sheth places on record the 30th Annual Report 201213 of the company in this regard. In the report, there is a reference of the audit committee. It reads as under:

AUDIT COMMITTEE: The Board of Directors has set up an Audit Committee which presently has four members namely, Dr. J. S. Juneja, Dr. R. Srinivasan, Dr. Sailendra Narain and Mr. Michael Bastian all of whom are non-executive and independent Directors having financial and accounting knowledge. Mr. Michael Bastian has been appointed as the Chairman of the Audit Committee from 29th April 2009. The Managing Director, Executive Director, Chief Financial Officer, the statutory Auditors,

Cost Auditors and internal auditors are the invitees at the meetings of Audit Committee, as and when required. The Audit Committee met on six occasions during the accounting year under review. The role of the Audit Committee was defined and continues to be as under:

1. Oversight of the Company's financial reporting process and the disclosures of its financial information to ensure that the financial information is correct, sufficient and credible.
2. Recommending to the Board, appointment, reappointment and, if required, the replacement or removal of the statutory auditor and the fixation of audit fees.
3. Approval of payment to statutory auditors for any other services rendered by the statutory auditors.
4. Reviewing with the management the annual financial statements before submission to the board for approval, with particular reference to:
 - a. Matters required to be included in the Director's Responsibility Statement to be included in the Board's report in terms of clause (2AA) of section 217 of the Companies Act, 1956
 - b. Changes, if any, in accounting policies and practices and reasons for the same
 - c. Major accounting entries involving estimates based on the exercise of judgment by management
 - d. Significant adjustments made in the financial statements arising out of audit findings
 - e. Compliance with listing and other legal requirements relating to financial statements
 - f. Disclosure of any related party transactions
 - g. Qualifications in the draft audit report.
5. Reviewing, with the management, the quarterly financial statements before submission to the board for approval
6. Reviewing, with the management, performance of statutory and internal auditors, adequacy of the internal control systems.
7. Reviewing the adequacy of internal audit function, if any, including the structure of the internal audit department, staffing and seniority of the official heading the department, reporting structure coverage and frequency of internal audit.
8. Discussion with internal auditors any significant findings and follow up there on.

9. Reviewing the findings of any internal investigations by the internal auditors into matters where there is suspected fraud or irregularity or a failure of internal control systems of a material nature and reporting the matter to the board.

10. Discussion with statutory auditors before the audit commences, about the nature and scope of audit as well as post audit discussion to ascertain any area of concern.

11. To look into the reasons for substantial defaults in the payment to the depositors, debenture holders, shareholders (in case of non payment of declared dividends) and creditors.

12. To review the functioning of the Whistle Blower mechanism, in case the same is existing.

13. Approval of appointment of CFO (i.e. the whole time Finance Director or any other person heading the finance function or discharging that function) after assessing the qualifications, experience & background, etc. of the candidate and recommending to the Board for his appointment.

14. Recommending to the Board the firm / individual for appointment as Cost Auditor.

15. Carrying out any other function as is mentioned in the terms of reference of the Audit Committee."

11 Mr. Sheth submitted that considering the role of the audit committee referred to above and the two applicants being the members of the said audit committee, it cannot be said that they had nothing to do with the affairs of the company. Mr. Sheth, thereafter, invited my attention to the fact that the company used to pay remuneration to both the applicants. The details of payments made to the non-executive Directors during the accounting year ended 31st June 2013 are as under: Name Sitting Fees (Rs.)

1

2 Dr. Joginder Singh Juneja '260,000

3 Dr. Sailendra Narain '140,000

12 In such circumstances referred to above, Mr. Sheth submitted that there being a prima facie case against the applicants to put them on trial, both the applications be rejected.

13 Having heard the learned counsel appearing for the parties and having considered the materials on record, the only question that falls for my consideration is whether the proceedings of the two criminal cases should be quashed.

14 I had an occasion to consider Section 141 of the Negotiable Instruments Act in details in the case of Nikhil P. Gandhi vs. State of Gujarat reported in 2016 (2) G.L.H. 762.

I may quote the relevant discussion in that regard as under:

. "SCOPE OF SECTION 141 OF THE NEGOTIABLE INSTRUMENTS ACT:

78 Before I proceed to consider the case of the other applicants, who have been arrayed as accused, by virtue of their vicarious liability, I propose to take note of the relevant portion of the complaint, which reads thus:

4) For and on behalf of accused No.1 Company, the accused No.2 had given cheque as security. In the year 2000 some cheques had arisen between the complainant firm and the accused No.2 and the accused No.1 Company did not pay legitimate amount of the complainant firm, therefore, the complainant has filed SPL. Civil Suit No.35 of 2000, 36/2000 and 37/2000 in the Civil Court at Amreli for recovery of dues, wherein the Court granted *ex parte* interim injunction below Ex. 5 in SPL. Civil Suit No.36 of 2000...

xxx xxx xxx

17) ...The accused No.3 to 13 and 17 and 17 to 19 are the directors of accused No.1 company, and they are in charge of day-to-day management of affairs of accused No.1 company hence, they are also responsible persons for the management of accused No.1 company... ..Moreover, the accused No.3 to 13 and 17 to 19 did not take proper care and caution to prevent occurrence of offence of dishonour of cheque nor did they make arrangement of money. The aforesaid cheque issued by accused No.1 company has returned/dishonoured, hence, the accused No.3 to 13 and 17 to 19 in their capacity as directors of accused No.1 have abated the commission of offence. The accused No.3 to 13 and 17 to 19 are in charge of day-to-day management of affairs of accused No.1 company. These accused persons had also attended various meetings on behalf of accused No.1 company. If the minutes of meeting Board of Directors dated 18/12/2010 are considered, then it is clear that there is mention therein about the dues of complainant and the cheque given for payment thereof. Therefore, it is clear that the accused No.3 to 13 and 17 to 19 were aware about the issuance of cheque by accused No.1.

79 Two classes of persons are liable to be prosecuted under Section 138. First, those persons who are in charge of and responsible to the company for the conduct of its business. They are *per se* responsible. In the second category comes those persons with whose consent or connivance the offence can be attributed. When the offence under Section 138 of the Negotiable Instruments Act has been committed by 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. (vide Section 141 of the Negotiable Instruments Act). In *Anil Hada v. Indian Acrylic Ltd* [2000 Cri. LJ 373 (SC) : (2001) 1 SCC 1, it has been pointed out that three categories of persons can be discerned as brought within the purview of the penal liability, through the legal fiction envisaged in Section 141 of the Negotiable Instruments Act. They are: (1) The company which committed the offence. (2) Every person who

was incharge of and responsible to the company for the conduct of the business of the company. (3) Any other person who is a director or a manager or a secretary or any officer of the company with whose connivance or with whose neglect the company has committed the offence. [Followed in M/s. B.S.I. Ltd v. Gift Holdings Pvt Ltd, 2000 Cr. LJ 1424 : AIR 2000 SC 926] The Apex Court in the said case of Anil Hada further explaining the law as to the liability of the company and its directors, for committing offence of dishonour of cheque, has held that normally an offence can be committed by human beings who are natural persons. Such offence can be tried according to the procedure established by law. But there are offences which could be attributed to the juristic persons also. If the drawer of a cheque happens to be a juristic person like a body corporate it can be prosecuted for the offence under Section 138 of the Act. Now there is no scope for doubt regarding that aspect in view of the clear language employed in Section 141 of the Act. In the expanded ambit of the word company even firms or any other associations of persons are included and as a necessary adjunct thereof a partner of the firm is treated as a director of that company. Thus when the drawer of the cheque who falls within the ambit of Section 138 of the Act is a human being or a body corporate or even a firm, prosecution proceedings can be initiated against such drawer. In this context the phrase as well as used in subsection (1) of Section 141 of the Act has some importance. The said phrase would embroil the persons mentioned in the first category within the tentacles of the offence on a par with the offending company. Similarly the words shall also in subsection (2) are capable of bringing the third category persons additionally within the dragnet of the offence on an equal par. The effect of reading Section 141 is that when the company is the drawer of the cheque such company is the principal offender under Section 138 of the Act and the remaining persons are made offenders by virtue of the legal fiction created by the Legislature as per the section. Hence the actual offence should have been committed by the company, and then alone the other two categories of persons would become liable for the offence. Section 141 (1) of the Negotiable Instruments Act would provide that 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. Section 141(2) provides, where any offence 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. So, the joint reading of the subsections (i)a(2) of Section 141 would make it clear that both the company as well as other persons who are connected and responsible for the conduct of the business of the company are liable to be proceeded. Where offence under Section 138 of Negotiable Instruments Act is committed by a company, the complaint must prima facie disclose the act committed by the Directors from which a reasonable inference of their vicarious liability can be drawn. [Ashok Muthanna v. Exports Finance Ltd (2001) 2 Crimes 602 (Mad)] Vicarious liability in legal parlance means the liability of the master for the acts of the servant or agent done in the course of

employment. Section 141 makes a natural person vicariously liable for the contravention committed by a company provided such person has some nexus with the crime either because of his connivance with it or due to by criminal negligence which had resulted in its commission. No doubt the law makes the principal liable for the acts of his agent, but unless there is some absolute duty cast upon the principal, he cannot be held responsible for the acts of his agent. [State of Shew prasad, AIR 1956 All. 610 : 1956 Cr.L.J. 1156]

80 In K.K. Ahuja (supra), the Supreme Court while explaining the vicarious liability of persons of the company observed as under: 16. Having regard to section 141, when a cheque issued by a company (incorporated under the Companies Act, 1956) is dishonoured, in addition to the company, the following persons are deemed to be guilty of the offence and shall be liable to be proceeded against and punished :

(i) 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;

(ii) any Director, Manager, Secretary or other officer of the company with whose consent and connivance, the offence under Section 138 has been committed; and

(iii) any Director, Manager, Secretary or other officer of the company whose negligence resulted in the offence under Section 138 of the Act, being committed by the company. While liability of persons in the first category arises under subsection (1) of Section 141, the liability of persons mentioned in categories (ii) and (iii) arises under subsection (2). The scheme of the Act, therefore is, that a person who is responsible to the company for the conduct of the business of the company and who is in charge of business of the company is vicariously liable by reason only of his fulfilling the requirements of subsection (1). But if the person responsible to the company for the conduct of business of the company, was not in charge of the conduct of the business of 11 the company, then he can be made liable only if the offence was committed with his consent or connivance or as a result of his negligence.

17. The criminal liability for the offence by a company under Section 138, is fastened vicariously on the persons referred to in sub-section (1) of Section 141 by virtue of a legal fiction. Penal statutes are to be construed strictly. Penal statutes providing constructive vicarious liability should be construed much more strictly. When conditions are prescribed for extending such constructive criminal liability to others, courts will insist upon strict literal compliance. There is no question of inferential or implied compliance. Therefore, a specific averment complying with the requirements of Section 141 is imperative. As pointed out in K. Srikanth Singh vs. North East Securities Ltd 2007 (12) SCC 788, the mere fact that at some point of time, an officer of a company had played some role in the financial affairs of the company, will not be sufficient to attract the constructive liability under Section 141 of the Act.

18 Sub-section (2) of section 141 provides that a Director, Manager, Secretary or other officer, though not in charge of the conduct of the business of the company

will be liable if the offence had been committed with his consent or connivance or if the offence was a result of any negligence on his part. The liability of persons mentioned in sub-section (2) is not on account of any legal fiction but on account of the specific part played consent and connivance or negligence. If a person is to be made liable under sub-section (2) of section 141, then it is necessary to aver consent and connivance, or negligence on his part.

19 This takes us to the next question under sub-section (1) of section 141, as to (i) who are the persons who are responsible to the company for the conduct of the business of the company, and (ii) who could be said to be in charge and was responsible to the company for the conduct of the business of the company. The words "every person who, at the time of the offence was committed, was in charge of, and was responsible for the conduct of the business of the company" occurs not only in section 141(1) of the Act but in several enactments dealing with offences by companies, to mention a few section 278 B of the Income Tax Act, 1961, Section 22C of Minimum Wages Act, 1948, Section 86A of the Employees State Insurance Act, 1948, Section 14A of Employees Provident Fund and Miscellaneous Provisions Act, 1952, Section 29 of Payment of Bonus Act, 1965, Section 40 of The Air 13 (Prevention and Control of Pollution) Act, 1981 and Section 47 of Water (Prevention and Control of Pollution) Act, 1974. But neither section 141(1) of the Act, nor the pari materia provisions in other enactments give any indication as to who are the persons responsible to the company, for the conduct of the business of the company. Therefore, we will have to fall back upon the provisions of Companies Act, 1956 which is the law relating to and regulating companies.

20 Section 291 of the said Act provides that subject to the provisions of that Act, the Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do. A company though a legal entity can act only through its Board of Directors. The settled position is that a Managing Director is prima facie in charge of and responsible for the company's business and affairs and can be prosecuted for offences by the company. But insofar as other directors are concerned, they can be prosecuted only if they were in charge of and responsible for the conduct of the company's business.

21 A combined reading of Section 5 and 291 of Companies Act, 1956 with the definitions in clauses (24), (26), (30), (31), (45) of section 2 of that Act would show that the following persons are considered to be the persons who are responsible to the company for the conduct of the business of the company :

- (a) the managing director(s);
- (b) the whole-time director(s);
- (c) the manager;
- (d) the secretary;

(e) any person in accordance with whose directions or instructions the Board of directors of the company is accustomed to act;

(f) any person charged by the Board with the responsibility of complying with that provision (and who has given his consent in that behalf to the Board); and

(g) where any company does not have any of the officers specified in clauses (a) to (c), any director or directors who may be specified by the Board in this behalf or where no director is so specified, all the directors. It follows that other employees of the company, cannot be said to be persons who are responsible to the company, for the conduct of the business of the company.

22 Section 141 uses the words "was in charge of, and was responsible to the company for the conduct of the business of the company". It is evident that a person who can be made vicariously liable under sub-section (1) of Section 141 is a person who is responsible to the company for the conduct of the business of the company and in addition is also in charge of the business of the company. There may be many directors and secretaries who are not in charge of the business of the company at all. The meaning of the words "person in charge of the business of the company" was considered by this Court in *Girdhari Lal Gupta v. D.N. Mehta* [1971 (3) SCC 189] followed in *State of Karnataka v. Pratap Chand* [1981 (2) SCC 335] and *Katta Sujatha vs. Fertiliser & Chemicals Travancore Ltd.* [2002 (7) SCC 655]. This Court held that the words refer to a person who is in overall control of the day to day business of the company. This Court pointed out that a person may be a director and thus belongs to the group of persons making the policy followed by the company, but yet may not be in charge of the business of the company; that a person may be a Manager who is in charge of the business but may not be in overall charge of the business; and that a person may be an officer who may be in charge of only some part of the business.

23 Therefore, if a person does not meet the first requirement, that is being a person who is responsible to the company for the conduct of the business of the company, neither the question of his meeting the second requirement (being a person in charge of the business of the company), nor the question of such person being liable under sub-section (1) of section 141 does not arise. To put it differently, to be vicariously liable under sub-section (1) of Section 141, a person should fulfill the 'legal requirement' of being a person in law (under the statute governing companies) responsible to the company for the conduct of the business of the company and also fulfill the 'factual requirement' of being a person in charge of the business of the company.

24 Therefore, the averment in a complaint that an accused is a director and that he is in charge of and is responsible to the company for the conduct of the business of the company, duly affirmed in the sworn statement, may be sufficient for the purpose of issuing summons to him. 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' (listed in para 14 above), 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.

25 It should, however, be kept in view that even an officer who was not in charge of and was responsible to the company for the conduct of the business of the company can be made liable under sub-section (2) of Section 141. 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.

26 Another aspect that requires to be noticed is that only a Director, Manager, Secretary or other officer can be made liable under sub-section (2) of section 141. But under sub-section (1) of section 141, it is theoretically possible to make even a person who is not a director or officer, liable, as for example, a person falling under category (e) and (f) of section 5 of Companies Act, 1956. When in SMS Pharma (I), this Court observed that 'conversely, a person not holding any office or designation in a company may be liable if he satisfies the requirement of being in charge of and responsible for conduct of the business of the company', this Court obviously had in mind, persons described in clauses (e) and (f) of section 5 of Companies Act. Be that as it may.

27 The position under section 141 of the Act can be summarized thus :

(i) If the accused is the Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. It is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix 'Managing' to the word 'Director' makes it clear that they were in charge of and are responsible to the company, for the conduct of the business of the company.

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

(iii) In the case of a Director, Secretary or Manager (as defined in Sec. 2(24) of the Companies Act) or a person referred to in clauses (e) and (f) of section 5 of Companies Act, an averment in the complaint that he was in charge of, and was responsible to the company, for the conduct of the business of the company is

necessary to bring the case under section 141(1). No further averment would be necessary in the complaint, though some particulars will be desirable. They can also be made liable under section 141(2) by making necessary averments relating to consent and connivance or negligence, in the complaint, to bring the matter under that sub-section.

(iv) Other Officers of a company can not be made liable under sub-section

(1) of section 141. Other officers of a company can be made liable only under sub-section

(2) of Section 141, be averring in the complaint their position and duties in the company and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence.

28 If a mere reproduction of the wording of section 141(1) in the complaint is sufficient to make a person liable to face prosecution, virtually every officer/employee of a company without exception could be impleaded as accused by merely making an averment that at the time when the offence was committed they were in charge of and were responsible to the company for the conduct and business of the company. This would mean that if a company had 100 branches and the cheque issued from one branch was dishonoured, the officers of all the 100 branches could be made accused by simply making an allegation that they were in charge of and were responsible to the company for the conduct of the business of the company. That would be absurd and not intended under the Act.

29 As the trauma, harassment and hardship of a criminal proceedings in such cases, may be more serious than the ultimate punishment, it is not proper to subject all and sundry to be impleaded as accused in a complaint against a company, even when the requirements of section 138 read and section 141 of the Act are not fulfilled.

81 In view of the aforesaid dictum of law explained by the Supreme Court, the other accused who have been arrayed as accused by virtue of Section 141 of the N.I. Act could not be held liable. I take notice of the fact that some of the accused are Office Bearers, like the Chief Operating Officer, Chief Financial Officer, Financial Controller. Some of the Directors are nominated Directors and also Non-Executive.

82 I am also not impressed by the argument of Mr. Ponda that as the inherent powers of this Court under Section 482 of the Cr.P.C. are circumscribed, and should be exercised only in cases where the Court finds an abuse of the process of law, all the applications deserve to be outright rejected, leaving all the legal contentions open to be canvassed before the trial Court.

83 In *Harshendra Kumar D. v. Rebatilata Koley etc* [2011 Criminal Law Journal 1626], the Supreme Court held as under:

21 In our judgment, the above observations cannot be read to mean that in a criminal case where trial is yet to take place and the matter is at the stage of issuance of summons or taking cognizance, materials relied upon by the accused which are in the nature of public documents or the materials which are beyond suspicion or doubt, in no circumstance, can be looked into by the High Court in exercise of its jurisdiction under Section 482 or for that matter in exercise of revisional jurisdiction under Section 397 of the Code. It is fairly settled now that while exercising inherent jurisdiction under Section 482 or revisional jurisdiction under Section 397 of the Code in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of merits of the accusations. However, in an appropriate case, if on the face of the documents which are beyond suspicion or doubt placed by accused, the accusations against him cannot stand, it would be travesty of justice if accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the High Court may look into the materials which have significant bearing on the matter at prima facie stage.

22. Criminal prosecution is a serious matter; it affects the liberty of a person. No greater damage can be done to the reputation of a person than dragging him in a criminal case.

84 I take notice of the fact that in complaints filed for the offence under Section 138 of the N.I. Act, all the Directors of the company and even the Office Bearers are routinely being proceeded against by invoking the provisions under Section 141 of the N.I. Act by glibly repeating the words in the section that certain Director was incharge of and responsible to the company for the conduct of business of the company. It is necessary to emphasis that Section 141 of the N.I. Act where an offence under Section 138 of the N.I. Act has been committed by a company, the complainant is required to give a serious thought and make enquiries and ascertain the fact as to whether a particular Director was incharge of and responsible to the affairs and conduct of the business of the company. Routinely roping in all the Directors by merely repeating the words used in Section 141 of the N.I. Act without ascertaining the facts is a serious matter which has to be deprecated.

85 Some of the applicants before me are indisputably non-executive Directors of the company. A non-executive Director is no doubt a custodian of the governance of the company, but does not involve in the day-today affairs of the running of its business and only monitors the executive activity. [See: Pooja Ravinder Devidasani v. State of Maharashtra, AIR 2015 SC 675]

86 In Pooja Ravinder Devidasani (supra), the Supreme Court made the following observations in para 30, which I deem fit to refer and rely upon :

30. Putting the criminal law into motion is not a matter of course. To settle the scores between the parties which are more in the nature of a civil dispute, the parties cannot be permitted to put the criminal law into motion and Courts cannot

be a mere spectator to it. Before a Magistrate taking cognizance of an offence under Section 138/141 of the N.I. Act, making a person vicariously liable has to ensure strict compliance of the statutory requirements. The Superior Courts should maintain purity in the administration of justice and should not allow abuse of the process of the Court. The High Court ought to have quashed the complaint against the appellant which is nothing but a pure abuse of process of law.

87 A Division Bench of this Court (to which I was a party) in the case of Ionic Metalliks and others [Special Civil Application No.645 of 2014 decided on 9th September 2014], while examining the challenge to the legality and validity of a master circular dated 2nd July 2012 issued by the Reserve Bank of India in respect of willful defaulters had an occasion to consider the categories of Directors as classified under the Companies Act. I may quote the following from the judgment referred to above: The circular speaks about director and independent and nominee director. The classification of the directors under the Companies Act is as under :

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 reappointment 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 reappointment) 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.

88 The following observations of the Supreme Court, made in the case of M/s. Pepsi Foods Ltd v. Special J.M. [1998 Cri. L.J. 1 : AIR 1998 SC 128] should be kept in mind by the Magistrates, when they decide to summon a director or partner of a company or firm to face trial under Section 138 of the Negotiable Instruments Act. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused. This has assumed all the more significance in view of the recent trend found that in respect of offences under Section 138 of the Negotiable Instruments Act alleged against a company, all the Directors of the company are being routinely roped in as accused with a statement that they are incharge of and responsible to the business of the company as required under Section 141 of the Negotiable Instruments Act. In fact, it has been seen that some times, even the nominee Directors nominated by the financial agencies like IDBI have also been arrayed as accused for the offence committed by the Company on the Board of which they have been nominated. The need to carefully scrutinize the material and if necessary to question the complainant as to the basis for implicating an accused as observed by the Supreme Court in the above cited judgment cannot be ignored. Considering this, it appears necessary that

at any rate even if on the basis of formal allegations in the complaint such Directors have been summoned to face the trial, they must be afforded an opportunity at least at the earliest stage to show with reference to the material which may be placed before the Court that they are not in charge of and are not responsible to the business of the company and on that basis seek their discharge from the array of the accused. In such cases, I think it will be a great injustice if they are asked to go through the ordeal of the trial and plead their defence only during the trial. [Om Prakash Agrawal v. State of A.P., 2001 Cri. L.J. 253 (para 13) A.P.]

89 In *N.K. Wahi v. Shekhar Singh and others* [2007 (9) SCC 481], the Supreme Court, after considering its earlier judgment on the point in question, held as under:

7. This provision clearly shows that so far as the companies are concerned if any offence is committed by it then every person who is a Director or employee of the company is not liable. Only such person would be held liable if at the time when offence is committed he was in charge and was responsible to the company for the conduct of the business of the company as well as the company. Merely being a Director of the company in the absence of above factors will not make him liable.

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 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. 90 In *Gunmala Sales Private Limited* (supra), the Supreme Court, after an exhaustive review of all its earlier decisions on Section 141 of the N.I. Act, summarized its conclusion as under:

a) Once in a complaint filed under Section 138 read with Section 141 of the NI Act the basic averment is made that the Director was in charge of and responsible for the conduct of the business of the company at the relevant time when the offence was committed, the Magistrate can issue process against such Director;

b) If a petition is filed under Section 482 of the Code for quashing of such a complaint by the Director, the High Court may, in the facts of a particular case, on an overall reading of the complaint, refuse to quash the complaint because the complaint contains the basic averment which is sufficient to make out a case against the Director;

c) In the facts of a given case, on an overall reading of the complaint, the High Court may, despite the presence of the basic averment, quash the complaint because of the absence of more particulars about role of the Director in the complaint. It may do so having come across some unimpeachable, uncontrovertible evidence which is beyond suspicion or doubt or totally acceptable circumstances which may clearly indicate that the Director could not have been concerned with the issuance of

cheques and asking him to stand the trial would be abuse of the process of the court. Despite the presence of basic averment, it may come to a conclusion that no case is made out against the Director. Take for instance a case of a Director suffering from a terminal illness who was bedridden at the relevant time or a Director who had resigned long before issuance of cheques. In such cases, if the High Court is convinced that prosecuting such a Director is merely an armtwisting tactics, the High Court may quash the proceedings. It bears repetition to state that to establish such case unimpeachable, uncontrovertible evidence which is beyond suspicion or doubt or some totally acceptable circumstances will have to be brought to the notice of the High Court. Such cases may be few and far between but the possibility of such a case being there cannot be ruled out. In the absence of such evidence or circumstances, complaint cannot be quashed;

d) No restriction can be placed on the High Court's powers under Section 482 of the Code. The High Court always uses and must use this power sparingly and with great circumspection to prevent inter alia the abuse of the process of the Court. There are no fixed formulae to be followed by the High Court in this regard and the exercise of this power depends upon the facts and circumstances of each case. The High Court at that stage does not conduct a mini trial or roving inquiry, but, nothing prevents it from taking unimpeachable evidence or totally acceptable circumstances into account which may lead it to conclude that no trial is necessary qua a particular Director."

15 In the case of *Standard Chartered Bank vs. State of Maharashtra and others* [(2016) 6 SCC 62], the Supreme Court very succinctly explained and discussed the issue in question after an exhaustive review of all its earlier decisions on the point. I may quote the relevant observations made in paras 9 to 34 as under:

"9. To appreciate the controversy in proper perspective, it is appropriate to refer to Sections 138 and 141 of the Act. Section 138 reads 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 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 be extended 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, 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.

10 On a studied scrutiny of the aforesaid provision, it is quite limpid that to constitute the criminal liability the complainant is required to show that a cheque was issued; that it was presented in the bank in question; that on due presentation, it was dishonoured; that, as enshrined in the provision, requisite notice was served on the person who was sought to be made liable for criminal liability; and that in spite of service of notice, the person who has been arraigned as an accused did not comply with the notice by making payment or fulfilling other obligations within the prescribed period, that is, 15 days from the date of receipt of notice.

11. Section 141 of the Act deals with offences by companies. It reads as follows: 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.

12 On a perusal of the aforesaid provision, it is clear as crystal that if the person who commits an offence under Section 138 of the Act is a company, the company as well as other person in charge of or responsible to the company for the conduct of the business of the company at the time of commission of the offence is

deemed to be guilty of the offence. Thus, it creates a constructive liability on the persons responsible for the conduct of the business of the company.

13 At one point of time, an issue had arisen before this Court, whether a complaint could be held to be maintainable without making the company a party. The said controversy has been put to rest by a three Judge Bench decision in *Aneeta Hada v. Godfather Travels and Tours Private Limited*⁶ wherein it has been held that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. It has been further held therein that there cannot be any vicarious liability unless there is a prosecution against the company. In the case at hand, the company has been arrayed as the accused No. 1 along with the Chairman and other Directors.

14 Now, we must go back in time to appreciate what has been stated in *S.M.S. Pharma I (supra)*, wherein a three Judge Bench answered a reference on three issues. The answers on two issues which are relevant for the present purpose are as follows:

(a)

(b) Whether a director of a company would be deemed to be in charge of, and responsible to, the company for conduct of the business of the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary.

(c) Even if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and or the managing directors or joint managing director who admittedly would be in charge of the company and responsible to the company for conduct of its business could be proceeded against.

15 The three Judge Bench referred to Section 138 and 141 of the Act, Sections 203 and 204 of CrPC and observed that a complaint must contain material to enable the Magistrate to make up his mind for issuing process and if this were not the requirement, consequences would be farreaching. If a Magistrate has to issue process in every case, the burden of work before the Magistrate as well as the harassment caused to the respondents to whom process has to be issued would be tremendous. It has been observed therein that Section 204 of the CrPC commences with the words if in the opinion of the Magistrate taking cognizance of an offence there is sufficient ground for proceeding and that apart, the words sufficient ground for proceeding again suggest that ground should be made out in the complaint for proceeding against the respondent. The three Judge Bench has ruled that it is settled law that at the time of issuing of the process, the Magistrate is required to see only the allegations in the complaint and where the allegations in the complaint or the chargesheet do not constitute an offence against a person, the complaint is liable to be dismissed.

16 After so stating, the Court adverted to the complaint filed under Section 138 of the Act and opined that the complaint should make out a case for issue of process.

As far as the officers responsible for conducting the affairs of the company are concerned, the Court referred to various provisions of the Companies Act, 1956 and analysed Section 141 of the Act to lay down as follows: 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.

17 After so stating, the Court placed reliance on sub-section 2 of Section 141 of the Act for getting support of the aforesaid reasoning as the said sub-section envisages direct involvement of any Director, Manager, Secretary or other officer of a company in the commission of an offence. The Court proceeded to observe that the said provision 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 the offices in a company. It has also been observed that provision has been made for directors, managers, secretaries and other officers of a company to cover them in cases of their proved involvement. It is because a person who is in charge of and responsible for conduct of business of a company would naturally know why a cheque in question was issued and why it got dishonoured and simultaneously it means no other person connected with a company is made liable under Section 141 of the Act. The liability arises, as the three Judge Bench opined, on account of conduct, act or omission on the part of an officer and not merely on account of holding office or position in a company and, therefore, in order to bring a case within Section 141 of the Act, the complaint must disclose the necessary facts which makes a person liable. In the said case, the Court has referred to the decisions in *Secunderabad Health Care Ltd. v. Secunderabad Hospitals (P) Ltd.* [1999 (96) Comp Case 106], *V. Sudheer Reddy v. State of A.P.*[2000 (107) Comp

Case 107], R. Kanan v. Kotak Mahindra Finance Ltd. [2003 (115) Comp Case 321], Lok Housing ad Constructions Ltd. v. Raghupati Leasing and Finance Ltd [2003 (115) Comp Case 957], Sunil Kumar Chhaparia v. Dakka Eshwaraiah [2002 (108) Comp Case 687], State of Haryana v. Brij Lal Mittal [1998 (5) SCC 343], K.P.G. Nair v. Jindal Menthol India Ltd. [2001 (10) SCC 218], Katta Sujatha v. Fertilizers & Chemicals Travancore Ltd. [2002 (7) SCC 655] and eventually expressed thus: A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That the respondent falls within the parameters of Section 141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141, he would issue the process. We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non-director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial.

18 On the basis of the aforesaid analysis, the Court in this regard concluded that: 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.

19 After the three Judge Bench answered the reference, the matter was placed before a two Judge Bench. The two Judge Bench, hearing S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and another [2007 (4) SCC 70] (hereinafter referred to as SMS Pharma II), reproduced a passage from Sabitha Ramamurthy v. R.B.S. Channabasavaradhya [2006 (10) SCC 581] which reads as follows: 7. A bare perusal of the complaint petitions demonstrates that the statutory requirements contained in Section 141 of the Negotiable Instruments Act had not been complied with. It may be true that it is not necessary for the complainant to specifically reproduce the wordings of the section but what is required is a clear statement of fact so as to enable the court to arrive at a prima facie opinion that the accused are vicariously liable. Section 141 raises a legal fiction. By reason of the said provision, a person although is not personally liable for commission of such an offence would be vicariously liable therefor. Such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned only if the requisite statements, which are required to be averred in the complaint petition, are made so as to make the accused therein vicariously liable for the offence committed by the company. Before a person can be made vicariously liable, strict compliance with the statutory requirements would be insisted.

20 Thereafter the Court referred to the authority in Saroj Kumar Poddar v. State (NCT of Delhi) and another [2007 (3) SCC 693] and noted the observations which we think it apt to reproduce:14. Apart from the Company and the appellant, as noticed hereinbefore, the Managing Director and all other Directors were also made accused. The appellant did not issue any cheque. He, as noticed hereinbefore, had resigned from the directorship of the Company. It may be true that as to exactly on what date the said resignation was accepted by the Company is not known, but, even otherwise, there is no averment in the complaint petitions as to how and in what manner the appellant was responsible for the conduct of the business of the Company or otherwise responsible to it in regard to its functioning. He had not issued any cheque. How he is responsible for dishonour of the cheque has not been stated. The allegations made in para 3, thus, in our opinion do not satisfy the requirements of Section 141 of the Act.

21. The said observations were clarified by stating that:26. A faint suggestion was made that this Court in Saroj Kumar Poddar (supra) has laid down the law that the complaint petition not only must contain averments satisfying the requirements of Section 141 of the Act but must also show as to how and in what manner the appellant was responsible for the conduct of the business of the company or otherwise responsible to it in regard to its functioning. A plain reading of the said judgment would show that no such general law was laid down therein. The observations were made in the context of the said case as it was dealing with a contention that although no direct averment was made as against the appellant of the said case fulfilling the requirements of Section 141 of the Act but there were other averments which would show that the appellant therein was liable therefor.

22 The said clarification was reiterated in Everest Advertising (P) Ltd. v. State, Govt. of NCT of Delhi and others18.

23 In the said case, taking note of the assertions in the complaint which were really vague, the Court declined to interfere with the order passed by the High Court which had opined that the complainant did not disclose commission of offence against the accused persons.

24 Be it noted, the observations made in Saroj Kumar Poddar (supra) and clarification given in SMS Pharma II (supra) and Everest Advertising (P) Ltd. (supra) were taken note of in K.K. Ahuja v. V.K. Vora and Anr 2009 (10) SCC 48]. In the said case, the Court explaining the position under Section 141 of the Act has stated thus:

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

(I) If the accused is the Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. It is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix Managing to the word Director makes it clear that they were in charge of and are responsible to the company, for the conduct of the business of the company.

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

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

(iv) Other officers of a company cannot be made liable under sub-section (1) of Section 141. Other officers of a company can be made liable only under sub-section (2) of Section 141, by averring in the complaint their position and duties in the company and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence.

25 In *Harmeet Singh Paintal* (supra), a two Judge Bench did not agree with the stand of the appellant, emphasized on the averments and found that in the complaint petition there were no specific averments and, accordingly, dismissed the appeal filed by the appellant Corporation therein. The Court in paragraphs 17 and 18 of the judgment reproduced the part of the complaint. We have carefully perused the said averments in the claim petition and we are of the opinion that there cannot be any shadow of doubt that the assertions made therein did not meet the requirements of Section 141 of the Act.

26 In *A.K. Singhanian* (supra), after referring to the previous judgments, the Court found that it was difficult to infer that there was any averment that the two accused persons who had come to this Court, were in charge and responsible for the conduct of the business of the Company at the time the offence was committed. The allegation in the complaints in sum and substance was that business and financial affairs of the Company used to be decided, organized and administered by accused persons along with other Directors.

27 In *Gunmala Sales Pvt. Ltd.* (supra) the Court was concerned with Directors who issued the cheques. This authority, as we notice, has to be appositely understood. The two Judge Bench referred to *SMS Pharma I* and other earlier decisions, and came to hold that:

30. When a petition is filed for quashing the process, in a given case, on an overall reading of the complaint, the High Court may find that the basic averment is

sufficient, that it makes out a case against the Director; that there is nothing to suggest that the substratum of the allegation against the Director is destroyed rendering the basic averment insufficient and that since offence is made out against him, his further role can be brought out in the trial. In another case, the High Court may quash the complaint despite the basic averment. It may come across some unimpeachable evidence or acceptable circumstances which may in its opinion lead to a conclusion that the Director could never have been in charge of and responsible for the conduct of the business of the company at the relevant time and therefore making him stand the trial would be an abuse of process of court as no offence is made out against him.

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

28 After so stating, the Court proceeded to summarise its conclusions, appreciated the averments made in the complaint petition and opined thus:& Pertinently, in the application filed by the respondents, no clear case was made out that at the material time, the Directors were not in charge of and were not responsible for the conduct of the business of the Company by referring to or producing any incontrovertible or unimpeachable evidence which is beyond suspicion or doubt or any totally acceptable circumstances. It is merely stated that Sidharth Mehta had resigned from the directorship of the Company on 30/9/2010 but no incontrovertible or unimpeachable evidence was produced before the High Court as was done in Anita Malhotra [2012 (1) SCC 520] to show that he had, in fact, resigned long before the cheques in question were issued. Similar is the case with Kanhaiya Lal Mehta and Anu Mehta. Nothing was produced to substantiate the contention that they were not in charge of and not responsible for the conduct of the business of the Company at the relevant time. In the circumstances, we are of the opinion that the matter deserves to be remitted to the High Court for fresh hearing. However, we are inclined to confirm the order passed by the High Court quashing the process as against Shobha Mehta. Shobha Mehta is stated to be an old lady who is over 70 years of age. Considering this fact and on an overall reading of the complaint in the peculiar facts and circumstances of the case, we feel that making her stand the trial would be an abuse of process of court. It is however, necessary for the High Court

to consider the cases of other Directors in light of the decisions considered by us and the conclusions drawn by us in this judgment.

29 We have referred to the aforesaid decision in extenso, as we are of the convinced opinion that the analysis made therein would squarely apply to the case at hand and it shall be clear when we reproduce certain passages from the complaint.

30 Prior to that, we may profitably refer to a two Judge Bench decision in Tamil Nadu News Print & Papers Ltd. v. D. Karunakar and Others 2015 (8) Scale 733]. In the said case, the Court has referred to the decision rendered in S.M.S. Pharma I (supra) and, thereafter, taken note of the averments made in the complaint. Be it noted, in the said case it had been averred in the complaint petition that the accused Nos. 2 to 9 were Directors and were in day to day management of the accused company and in that context the Court has opined as follows: Upon perusal of the complaint, we find that an averment has been made to the effect that Accused Nos.3 to 10 were in fact, incharge of the day-today business of Accused No.1 company.

31 We have referred to these decisions as they explicitly state the development of law and also lay down the duty of the High Court while exercising the power of quashing regard being had to the averments made in the complaint petition to attract the vicarious liability of the persons responsible under Section 141 of the Act.

32 Now, is the time to scan the complaint. Mr. Divan, learned senior counsel appearing for the appellant-bank, has drawn our attention to paragraphs 2, 4 and 10 of the complaint petition. They read as follows:2. I further say that I know the accused above named. The accused No.1 is a Company incorporated under the Companies Act, 1956 having its registered address as mentioned in the cause title. The accused Nos.2 to 7 are the Chairman, Managing Director, Executive Director and whole time Director and authorized signatories of accused No.1 respectively. As such being the Chairman, Managing Director, Executive Director and Whole Time Director were and are the persons responsible and in charge of day to day business of the accused No.1 viz. When the offence was committed. The accused Nos.6 and 7 being signatories of the cheque are aware of the transaction and therefore the accused Nos.2 to 7 are liable to be prosecuted jointly or severally for having consented and/or connived in the commission of present offence in their capacity as the Chairman, Managing Director, Executive Director, Whole Time Director and authorized signatories of accused No.1, further the offence is attributable to accused Nos.2 to 7 on account of their neglect to ensure and make adequate arrangements to Honour the cheque issued by accused No.1 and further on account of the neglect of accused Nos.1 to 7 to comply with the requisition made in the Demand Notice issue under the provisions of Section 138(c) of the Negotiable Instruments Act within the stipulated period. The accused are therefore liable to be proceeded.

Xxxxx xxxxx

4. I say that the Accused No. 1 through Accused Nos. 2 and 3 approached the Complainant Bank at its Branch situated at Mumbai for a Short Term Loan facility for a sum of Rs. 200 Crore to meet the expenditure of Four ORV vessels being built at ABG Shipyard. After verifying the documents submitted the Complainant Bank vide its sanction letter dated 28th April 2012 sanctioned the said Facility for the purpose mentioned therein. The said terms and conditions mentioned in the sanction letter dated 28th April 2012 were duly accepted by the Accused No. 1 by signing the same. Accused No. 1 also agreed to pay interest at the negotiated rate by the Complainant bank. Hereto annexed the marked as Exhibit B is a copy of the said sanction letter dated 28th April 2012.

XXXXX XXXXX

10. I say that the accused Nos.1 to 7 were aware that the aforesaid cheque would be dishonoured for being Account Blocked and all the accused, in active connivance mischievously and intentionally issued the aforesaid cheques in favour of the complainant Bank.

33 The aforesaid averments, as we find, clearly meet the requisite test. It is apt to mention here that there are seven accused persons. Accused No.1 is the Company, accused Nos.2 and 3 are the Chairman and Managing Director respectively and accused Nos.6 and 7 were signatory to the cheques. As far as the accused Nos.4 and 5 were concerned, they were wholtime Directors and the assertion is that they were in charge of day to day business of the Company and all of them had with active connivance, mischievously and intentionally issued the cheques in question.

34 Thus, considering the totality of assertions made in the complaint and also taking note of the averments put forth relating to the respondent Nos. 2 and 3 herein that they are whole-time Director and Executive Director and they were in charge of day to day affairs of the Company, we are of the considered opinion that the High Court has fallen into grave error by coming to the conclusion that there are no specific averments in the complaint for issuance of summons against the said accused persons. We unhesitatingly hold so as the asseverations made in the complaint meet the test laid down in Gunmala Sales Pvt. Ltd. (supra)."

16 In the complaint, there are specific averments that the applicants herein were incharge and responsible for the conduct of the business of the company. Over and above the averments made in the complaints, it is brought out that both the applicants were members of the audit committee. The role and functions of the members of the audit committee have also been noted above. Apart from the same, they were also being paid remuneration by the company. In such circumstances, it is difficult for me to take the view that the applicants herein were absolutely alien to the company.

17 In case of offence by company for the dishonour of cheque, the culpability of the Directors has to be decided with reference to Section 141 of the Act. The same reads as follows:

"141. Offences by companies.

(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was incharge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence: Provided further that where 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."

18 From a plain reading of the aforesaid provision it is evident that every person who at the time the offence was committed is in charge of and responsible to the Company shall be deemed to be guilty of the offence under Section 138 of the Act. In the face of it, will it be necessary to specifically state in the complaint that the person accused was incharge of and responsible for the conduct of the business of the Company? In my opinion, in the case of offence by Company, to bring its Directors within the mischief of Section 138 of the Act, it shall be necessary to allege that they were incharge of and responsible to the conduct of the business of the Company. It is necessary ingredient which would be sufficient to proceed against such Directors. However, I may add that as no particular form is prescribed, it may not be necessary to reproduce exact the words of the section. If reading of the complaint shows and substance of accusation discloses the necessary averments, that would be sufficient to proceed against such of the Directors and no particular form is necessary. However, it may not be necessary to allege and prove that, in fact, such of the Directors have any specific role in respect of the transaction leading to the issuance of cheque. Section 141 of the Act makes the Directors incharge and responsible to Company "for the conduct of the business of the Company" within the mischief of Section 138 of the Act and not particular business for which the cheque was issued. One should not read more than what has been mandated in Section 141 of the Act. [See: A.K. Singhani vs. GSFC , 2014 Cri. L.J. 340].

19 In *Mannalal Chmaria and another vs. State of West Bengal* [2014 Cri. L.J. 2160], the Supreme Court, on the very same issue, made certain observations which are important for the purpose of deciding this application:

"9. The law on the subject is now very well-settled by a series of decisions rendered by this Court and it is not necessary to repeat the views expressed time and again. Suffice it to say, that the law has once again been stated in *A. K. Singhania v. Gujarat State Fertilizer Company Ltd.* [AIR 2014 SC 71 : 2013 AIR SCW 6195] to the effect that it is necessary for a complainant to state in the complaint that the person accused was in charge of and responsible for the conduct of the business of the company. Although, no particular form for making such an allegation is prescribed, and it may not be necessary to reproduce the language of Section 138 of the Negotiable Instruments Act, 1881, but a reading of the complaint should show that the substance of the accusation discloses that the accused person was in charge of and responsible for the conduct of the business of the company at the relevant time. From the averment made in the complaint, which is reproduced above, it can safely be said that there is no specific or even a general allegation made against the appellants."

20 Mr. Sheth places reliance on one decision of the Calcutta High Court in the case of *Sujit Chakravorti vs. State of West Bengal* [Criminal Revision Applications Nos.1535 - 1540 of 2014 decided on 17th November 2014], wherein a learned Single Judge of the High Court held as under:

"Now, going to the averment made in paragraph 4 of the complaint annexed with this application, I find it is the case of the complainant that accused no. 4, Sujit Chakravorti although along with other designated as non-Executive Director still they are on various Committees of the Board of Directors overseeing financial, audit and other matters directly related to the conduct of the business of the accused no. 1, the Company. It was also alleged that they were all in charge of and responsible for the conduct and management of the daytoday business and affairs of the accused no. 1, Kitply Industries Ltd. during the material time. Having regard to what have been stated in paragraph 4 of the complaint as aforesaid, this court is of the opinion, there is no lack of necessary averment as required for prosecuting any Director under section 138 N.I. Act, with the aid of section 141 of the said Act in all the aforesaid criminal revisions. In the case of *SMS Pharmaceutical Ltd. Vs Neeta Bhalla* reported in (2005) 8 SCC 89, the Apex Court while as laid down what should be an essential requirement to be afford for an offence punishable under section 138 of the Negotiable Instruments Act with the aid of section 141 of the said Act. In clause (a) of the said decision, the Apex court observed as follows:

"(a) Whether for purposes of Section 141 of the Negotiable Instruments Act, 1881, it is sufficient if the substance of the allegation read as a whole fulfil the requirements of the said section and it is not necessary to specifically state in the complaint that the person accused was in charge of, or responsible for, the conduct of the business of the company."

Here in this case, there is specific averments that the present petitioner was in charge of and responsible for the conduct of the day to day affairs of the accused No. 1, the Company during the material time when the offence was committed."

21 What is important are the observations of the Supreme Court in the case of Gunmala Sales Private Ltd vs. Anu Mehta [(2015) 1 SCC 103] as contained in para 30. Let me quote the observations as contained in para 30 as under: "When in view of the basic averment process is issued the complaint must proceed against the Directors. But, if any Director wants the process to be quashed by filing a petition under Section 482 of the Code on the ground that only a bald averment is made in the complaint and that he is really not concerned with the issuance of the cheque, he must in order to persuade the High Court to quash the process either furnish some sterling uncontrovertible material or acceptable circumstances to substantiate his contention. He must make out a case that making him stand the trial would be abuse of the process of court. He cannot get the complaint quashed merely on the ground that apart from the basic averment no particulars are given in the complaint about his role, because ordinarily the basic averment would be sufficient to send him to trial and it could be argued that his further role could be brought out in the trial. Quashing of a complaint is a serious matter. Complaint cannot be quashed for the asking. For quashing of a complaint it must be shown that no offence is made out at all against the Director."

22 Thus, if there are basic averments in the complaint supported by some other evidence on record, then the burden would shift upon the accused to show that he had nothing to do with the day-to-day affairs and working of the company at the time of the commission of the offence. As observed by the Supreme Court, the accused will have to furnish some sterling uncontrovertible material or acceptable circumstances to substantiate such contention. The accused cannot get the complaint quashed merely on the ground that apart from the basic averments, no particulars are given in the complaint about his role, because ordinarily the basic averment would be sufficient to send him to trial and it could be argued that his further role could be brought out in the trial.

23 I do not propose to close the doors of the applicants at this stage. It will be still open for the applicants to adduce sufficient and necessary materials in the course of the trial to establish that they, being non-executive and independent Directors, had no role to play in the day-to-day affairs and management of the company. The Trial Court shall consider such evidence that may be led by the parties in the course of the trial and then take an appropriate decision before fastening vicarious liability under Section 141 of the Negotiable Instruments Act. While deciding or fixing the vicarious liability of the applicants herein, the Trial Court shall not be influenced by any of the observations made by this Court in this judgment, except the position of law.

24 In view of the above, both the applications fail and are hereby rejected. Rule is discharged. The adinterim order earlier granted stands vacated.