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PAWAN KUMAR GOEL

v.

STATE OF U. P. & ANOTHER

(Criminal Appeal No. 1999 of 2022)

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NOVEMBER 17, 2022

[KRISHNA MURARI AND BELA M. TRIVEDI, JJ.]

- Negotiable Instrument Act, 1881 – ss. 138, 141, 142 – Whether a director of a company would be liable for prosecution u/s. 138 of NI Act without the company being arraigned as an accused – Held: If the complainant fails to make specific averments against the company in the complaint for the commission of an offence u/s. 138 of NI Act, the same cannot be rectified by taking recourse to general principles of criminal jurisprudence – The provisions of s.141 impose vicarious liability by deeming fiction which pre-supposes and requires the commission of the offence by the company or firm – Therefore, unless the company or firm has committed the offence as a principal accused, the persons mentioned in sub-Section (1) and (2) would not be liable to be convicted on the basis of the principles of vicarious liability.*
- E Negotiable Instrument Act, 1881 – ss. 138, 141, 142 – Whether a complaint u/s. 138 of NI Act would be liable to be proceeded against the director of the company without their being any averments in the complaint that the director arrayed as an accused was in charge of and responsible for the conduct and business of the company – Held: It is settled that vicarious liability of a person for being prosecuted for an offence committed under the Act by a company arises if at the material time he was in charge of and was also responsible to the company for the conduct of its business – Simply because a person is a director of a company, it does not necessarily mean that he fulfils both the above requirements so as to make him liable – In the instant case, perusal of the averments made in the complaint goes to show beyond a shadow of doubt that there are no averments that respondent no. 2 (director of the company), at the time when the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company.*
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Dismissing the appeals, the Court

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HELD: 1. The description of the respondent-accused contained in the complaint is that though the respondent-accused was described as a Director of ROL, but the company itself was not arrayed as a party in the complaint. A perusal of the averments made in the complaint also goes to show beyond a shadow of doubt that there are no averments that respondent no. 2, at the time when the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company. This Court has been firm with the stand that if the complainant fails to make specific averments against the company in the complaint for the commission of an offence under Section 138 of NI Act, the same cannot be rectified by taking recourse to general principles of criminal jurisprudence. Needless to say, the provisions of Section 141 impose vicarious liability by deeming fiction which pre-supposes and requires the commission of the offence by the company or firm. Therefore, unless the company or firm has committed the offence as a principal accused, the persons mentioned in sub-Section (1) and(2) would not be liable to be convicted on the basis of the principles of vicarious Liability. [Paras 18 & 19][115-C-H]

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2. Arguments advanced by counsel for the appellant that an additional accused can be impleaded subsequent to the filing of the complaint merits no consideration, once the limitation prescribed for taking cognizance of the offence under Section 142 of NI Act has expired. More particularly, in view of the fact that neither any effort was made by the petitioner at any stage of the proceedings to arraign the company as an accused nor any such circumstances or reason has been pointed out to enable the Court to exercise the power conferred by proviso to Section 142, to condone the delay for not making the complaint within the prescribed period of limitation. [Para 23][119-E-G]

3. The three-Judge Bench also took note of the earlier pronouncements of this Court in the case of State of Haryana Vs. Brij Lal Mittal & Ors., wherein it was held that vicarious liability of a person for being prosecuted for an offence committed under the Act by a company arises if at the material time he was in

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- A charge of and was also responsible to the company for the conduct of its business. Simply because a person is a director of a company, it does not necessarily mean that he fulfils both the above requirements so as to make him liable. Conversely, without being a director a person can be in charge of and responsible to the company for the conduct of its business. The Bench also considered the dictum of this Court in the case of K.P.G. Nair Vs. Jindal Menthol India Ltd., which was also a case under the Negotiable Instruments Act. In the said case, it was found that the allegations in the complaint did not in express words or with reference to the allegations contained therein make out a case
- B that at the time of commission of the offence, the appellant was in charge of and was responsible to the company for the conduct of its business. It was held that requirement of Section 141 was not met and the complaint against the accused was quashed. [Paras 28 and 29][123-H; 124-A-D]
- C *Aneeta Hada v. Godfather Travels & Tours Pvt. Ltd. (2012) 5 SCC 661 : [2012] 5 SCR 503; S.M.S Pharmaceuticals Ltd. v. Neeta Bhalla & Another (2005) 8 SCC 89 : [2005] 3 Suppl. SCR 371; State of Haryana v. Brij Lal Mittal & Ors. (1998) 5 SCC 343 : [1998] 3 SCR 104 – relied on.*
- D *N.Harihara Krishnan v. J. Thomas (2018) 13 SCC 663 : [2017] 9 SCR 324; Bilakchand Gyanchand Co. v. A. Chinnaswami (1999) 5 SCC 693 : 1999 (10) JT 236; Rajneesh Aggarwal v. Amit. J. Bhalla (2001) 1 SCC 631 : [2001] 1 SCR 54; Himanshu v. B. Shivamurthy & Another (2019) 3 SCC 797 : [2019] 1 SCR 991; K.K. Ahuja v. V.K. Vora & Anr. (2009) 10 SCC 48 : [2009] 9 SCR 1144; K.P.G. Nair v. Jindal Menthol India Ltd. (2001) 10 SCC 218 : 2000 (1) Suppl. JT 519. - referred to.*
- E Case Law Reference

[2012] 5 SCR 503	relied on	Para 8
[2005] 3 Suppl. SCR 371	relied on	Para 8
[2017] 9 SCR 324	referred to	Para 10.3
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[2001] 1 SCR 54	referred to	Para 10.3	A
[2019] 1 SCR 991	referred to	Para 11.2	
[2009] 9 SCR 1144	referred to	Para 16	
[1998] 3 SCR 104	relied on	Para 28	

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. B
1999 of 2022.

From the Judgment and Order dated 19.11.2019 of the High Court of Judicature at Allahabad in Criminal Miscellaneous Writ Petition No. 24632 of 2013.

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With

Criminal Appeal Nos. 2000, 2001, 2002 and 2003 of 2022.

Anubhav Kumar, Abhishek Swarup, M/s. Manoj Swarup and Co., Advs. for the Appellant.

Vishwa Pal Singh, Rahul Verma, Adesh Kumar Gill, Mohd. Alim Khan, Vikas Gothwal, Shantanu Krishna, Advs. for the Respondents. D

The Judgment of the Court was delivered by

KRISHNA MURARI, J.

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Leave granted.

2. The present appeals are directed against the final judgment and order dated 19.11.2019 passed by the High Court of Judicature at Allahabad (hereinafter referred to as "**High Court**") in four Criminal Miscellaneous Writ Petitions filed by the Respondents seeking quashing of the summoning order dated 18.03.2013 passed by the Additional Chief Judicial Magistrate-II, Muzaffarnagar (hereinafter referred to as "**Magistrate**") and order dated 02.12.2013 passed by the Additional Sessions Judge, Muzaffarnagar (hereinafter referred to as "**Sessions Court**"). The High Court allowed the Writ Petition and quashed the entire proceedings including the summoning order dated 18.03.2013 as well as order dated 02.12.2013. F

3. As the present appeals are filed by the same Appellant challenging the same impugned judgment, for the sake of brevity they are being disposed of by this common Judgment. Criminal Appeal arising out of Special Leave Petition (Crl.) No. 1697 of 2020 is taken up as a G

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- A lead case and the parties arrayed thereunder are to be taken in the same manner for the other cases as well.

Factual background:

4. The Appellant is engaged in the business of sales of machinery and spare parts under the name and style of ‘*M/s Pawan Hardware Store*’. Respondent No. 2 herein is one of the Director of *Ravi Organics Limited*, a private limited company, engaged in the manufacturing and sales of various types of chemicals. Both of them were having business dealings and Ravi Organics Limited was having a running account with the appellant. Respondent No. 2 is alleged to have issued an account payee cheque for a sum of Rs. 10 Lakhs payable at Union Bank of India, Muzaffarnagar, in favor of the Appellant towards discharge of its liability for supply of materials made by the appellant. When the appellant presented the cheque before the banker, it was dishonored on 24.12.2012. The Appellant, thereafter, sent a legal notice dated 01.01.2013 to Respondent No. 2 through registered post, which, though, was served, however, there was no response from Respondent No.2.

5. Despite service of notice, when neither there was any response from the accused nor payment was made, appellant filed four criminal complaints against Respondent no. 2 for the offence punishable under Section 138 Negotiable Instruments Act, 1881 (hereinafter referred to as ‘NI Act’) on the allegations that the account payee cheque bearing no. 802276 of Union Bank of India, Muzaffarnagar, for a sum of Rs.10 lakhs dated 20.11.2012 issued by the respondent no. 2 towards the outstanding bills when presented for clearance was dishonored on the ground that the cheque amount exceeds arrangement.

- F 6. The Magistrate took cognizance of the said complaint and required the Appellant to get his statement recorded under Section 200 of the Code of Criminal Procedure (hereinafter referred to as ‘Cr.P.C’). However, on 07.02.2013, the Appellant filed an affidavit to this effect seeking that it be read as a statement under Section 200 Cr.P.C. The G Magistrate passed an order dated 18.03.2013 summoning Respondent No. 2 for trial in Criminal Case No. 162 of 2013.

- H 7. Being aggrieved by the summoning order dated 18.03.2013, Respondent no. 2 filed Criminal Revision No. 212 of 2013 before the Sessions Court. Vide order dated 02.12.2013, the Sessions Court dismissed the criminal revision petition and held that the cheque was issued against

outstanding payments arising out of commercial transactions between A
Respondent No. 2 and Appellant.

8. Respondent No. 2 aggrieved by the dismissal of the Criminal Revision approached the High Court by way of Criminal Miscellaneous Writ Petition No. 24632 of 2013 seeking quashing of the summoning order dated 18.02.2013 passed by the Magistrate and also the order dated 02.12.2013 passed by the Sessions Court. The High Court vide impugned judgment and order dated 19.11.2019 allowed the Writ Petition and quashed the entire proceedings including the summoning order dated 18.3.2013 passed by the Magistrate placing reliance on the pronouncement of this Court in the case of *Aneeta Hada Vs. Godfather Travels & Tours Pvt. Ltd.*¹ and *S.M.S Pharmaceuticals Ltd. Vs. Neeta Bhalla & Another.*² B C

8.1 The operative portion of the impugned judgment reads as under:-

"Considering the facts and circumstance of the present case, according to the complaint itself, the cheque was issued for Pawan Hardware Store, Sandeep talkies, near Court Road, Civil Lines, Muzaffar Nagar by the Director, Devendra Kumar Garg- petitioner. It is not averred in the complaint that Devendra Kumar Garg was in charge of and responsible for the conduct of the business of the company at the time of commission of the offence and hence he will not be liable for criminal action. It may be noted that the firm named as Ravi Organics Ltd., Nai Mandi, Muzaffar Nagar, who was the principal accused, has not been made party in the complaint as stated above and side by side the necessary averment required to be made in the complaint satisfying the requirements of Section 141 of the Act are also lacking to maintain prosecution as held in the decisions cited above. In this view of the matter, complaint itself is bad in law and the entire proceedings in pursuance thereof, including the summoning order dated 18.3.2013 passed by Addl. Chief Judicial Magistrate, Court No.2, Muzaffar Nagar in Criminal Case No.162 of 2013, Pawan Kumar Goel Vs. Devendra Kumar Garg, under Section 138 N.I. Act, P.S. Civil Lines, D E F G

¹(2012) 5 SCC 661

²(2005) 8 SCC 89

- A *District Muzaffar Nagar as well as order dated 2.12.2013 passed by Addl. Sessions Judge, Court No.7, Muzaffarnagar in Criminal Revision No. 212 of 2013, Devendra Kumar Garg Vs. Pawan Kumar Goel, is nothing but an abuse of process of the court and is liable to be quashed.”*
- B 9. We have heard Mr. Anubhav Kumar, learned counsel appearing on behalf of the Appellant and Mr. Vishwa Pal Singh, learned counsel appearing on behalf of the Respondents.
 - 10. Mr. Anubhav Kumar, learned counsel for the appellant submitted that the cheque issued by Respondent No. 2 towards payment
- C of outstanding dues of supply of material due to the Appellant was dishonoured and hence the respondent is guilty of committing offence under the Negotiable Instruments Act and was rightly summoned by the Trial Court to face the trial. He further submitted that the Criminal Revision Petition challenging the summoning order was also rightly dismissed but
- D the High Court committed a manifest error of law in causing interference and quashing the summoning order as well as the proceedings.
- 10.1 It was further submitted that the High Court erred in not appreciating that respondent no. 2 was arrayed by name describing him as a director of the *Ravi Organics Limited* and on account of a typographical error, the company could not be arrayed as accused no. 2
- E in the complaint by name, though the details thereof is mentioned in the description of accused no. 1.
- 10.2. He further submitted that the complaint contained all necessary factual allegations constituting each of the ingredients of offence under Section 138 of NI Act and there is no provision either
- F under the NI Act or under the Criminal Procedure Code, which prohibits the amendment of a complaint or the impleadment of an additional accused subsequent to the filing of the complaint.
- 10.3 Reliance to support the aforesaid contentions has been placed by the learned counsel for the appellant on the decisions of this Court in
- G ***N.Harihara Krishnan Vs. J. Thomas³, Bilakchand Gyanchand Co. Vs. A. Chinnaswami⁴, and Rajneesh Aggarwal Vs. Amit. J. Bhalla⁵.***

³(2018) 13 SCC 663

⁴(1999) 5 SCC 693

H ⁵(2001) 1 SCC 631

11. In reply, learned counsel appearing on behalf of the Respondent No. 2 submitted that the summoning order is erroneous as the proceedings itself is not maintainable without the company having not been arrayed as an accused in the complaint. A

11.1 It was also submitted that it is well settled by a catena of decisions that if a complaint under Section 138 of NI Act is filed in respect of dishonor of cheque issued from the account of the company, it is incumbent on the part of the complainant to make necessary averments in the complaint that at the time when the offence was committed, the person accused was in charge of and responsible for the conduct and business of the company. This averment is an essential requirement of Section 141 of NI Act. He further submitted that the infirmity in the complaint under Section 138 of NI Act for not impleading the company or not making specific averments in respect of the commission of offence by the company as required under the Act, cannot be said to be curable. B

11.2 Reliance in support of the contention was placed by the learned counsel for the respondent on the decisions of this Court in the case of *Aneeta Hada (Supra), SMS Pharmaceuticals Ltd. (Supra)*, and *Himanshu Vs. B. Shivamurthy & Another*⁶. C

12. Two main issues which falls for our consideration in this appeal are :- E

- (1) Whether a director of a company would be liable for prosecution under Section 138 of NI Act without the company being arraigned as an accused.
- (2) Whether a complaint under Section 138 of NI Act would be liable to be proceeded against the director of the company without their being any averments in the complaint that the director arrayed as an accused was in charge of and responsible for the conduct and business of the company. F

13. Before delving into the merits of the contention raised, it is important to analyze the cardinal provision which establishes the criminal liability upon the defaulter for dishonour of cheque i.e., Section 138 of NI Act. Section 138 of the NI Act reads as under: - G

⁶(2019) 3 SCC 797 H

- A ***"138. Dishonour of cheque for insufficiency, etc., of funds in the account. —***
- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions 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:*
- D *Provided that nothing contained in this section shall apply unless—*
- E *(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;*
- E *(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*
- F *(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.*
- G *Explanation— For the purposes of this section, “debt or other liability” means a legally enforceable debt or other liability.”*
- H 14. Section 141 of NI Act deals with offences by companies while extending the liability to every individual; who when the offence was committed was responsible for the conduct of the business which also extends towards key managerial positions like that of the Director. Section 141 of the NI Act reads as under: -

141. Offences by companies. —

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(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:

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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:

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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.

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(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.

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Explanation. — For the purposes of this section—

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

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

15. A bare perusal of Section 138 and Section 141 of NI Act indicates that Section 138 of the NI Act casts criminal liability punishable with imprisonment for a term that may be extended to two years or with

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- A a fine that may extend to twice the amount of the cheque, or with both on a person who issues a cheque towards discharge of a debt or liability in whole or in part and the cheque is dishonoured by the bank on presentation. While Section 141 extends such criminal liability in case of a company to every person who at the time the offence was committed, was in charge of, and was responsible for the conduct of the business of the company.
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16. A two-Judge Bench of this Court in the case of ***K.K. Ahuja v. KK. Vora & Anr.***⁷ after analysing the provisions contained in Section 141 of the Act, observed as under :-

- C *"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 :*
- D *(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.*
- F *While liability of persons in the first category arises under sub-section (1) of Section 141, the liability of persons mentioned in categories (ii) and (iii) arises under sub-section (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 sub- section (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 the company, then he can be made liable only if the offence was*
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committed with his consent or connivance or as a result of his negligence. A

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.* B C D

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.* E F

17. The scope of Section 141 of NI Act was again exhaustively considered by this Court in **S.M.S Pharmaceuticals (Supra)**:

"10.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 conduct of business of the G H

- A *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 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 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 actio...*
- E 18. To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. *A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That the respondent falls within the parameters of Section 141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141, he would issue the process. We have seen*
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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.”

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(emphasis supplied)

18. Coming to the facts of the present case at hand, a perusal of the complaint filed as Annexure P-1 clearly goes to establish two facts :-

(i) The description of the respondent-accused contained in the complaint is as under :-

“Mr. Devendra Kumar Garg, S/o Lala Jagdish Prasad Garg, Director, Ravi Organics Limited, 19-A, New Mandi, Police Station-New Mandi, District-Muzaffarnagar.”

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From the aforesaid, it is clear that though the respondent-accused was described as a Director of *Ravi Organics Limited*, but the company itself was not arrayed as a party in the complaint.

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(ii) A perusal of the averments made in the complaint goes to show beyond a shadow of doubt that there are no averments that respondent no. 2, at the time when the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company.

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19. This Court has been firm with the stand that if the complainant fails to make specific averments against the company in the complaint for the commission of an offence under Section 138 of NI Act, the same cannot be rectified by taking recourse to general principles of criminal jurisprudence. Needless to say, the provisions of Section 141 impose vicarious liability by deeming fiction which pre-supposes and requires the commission of the offence by the company or firm. Therefore, unless the company or firm has committed the offence as a principal accused, the persons mentioned in sub-Section (1) and (2) would not be liable to be convicted on the basis of the principles of vicarious liability.

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- A 20. Reference in this connection may also be made to another judgment of the two-Judge Bench of this Court in ***Himanshu Vs. B. Shivamurthy and Another (Supra)***, the facts wherein have a stark similarity to the facts of the present case, considering the issue where the complaint was lodged only against the director without arraigning the company as an accused and whether the company could be subsequently arraigned as an accused, it was observed as under:-
- “*11. In the present case, the record before the Court indicates that the cheque was drawn by the appellant for Lakshmi Cement and Ceramics Industries Ltd., as its Director. A notice of demand was served only on the appellant. The complaint was lodged only against the appellant without arraigning the company as an accused.*
- C *12. The provisions of Section 141 postulate that if the person committing an offence under Section 138 is a company, 4 (2018) 13 SC 663 every person, who at the time when the offence was committed was in charge of or 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.*
- D *13. In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an accused.”*
- G 21. This issue stands concluded by a decision of three-Judge Bench of this Court in the case of ***Aneeta Hada Vs. Godfather Travels & Tours (P) Ltd.(Supra)***, wherein it has been held that for maintaining the prosecution under Section 141 of NI Act, arraigning of the company as an accused is imperative and non-impleadment of the company would be fatal for the complaint. It may be relevant to extract the following from the said judgment :-
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"58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the Section make it absolutely unmistakably clear 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. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a director is indicted.

59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself."

22. The observations made in the aforesaid judgment is also a complete answer to the arguments advanced by learned counsel for the appellant that in the absence of any prohibition under the NI Act, the amendment in the complaint is permissible and the impleadment of an additional accused subsequent to filing of the complaint, would not be barred. At this juncture, we may also refer to the following observations made in the case of *N. Harihara Krishnan Vs. J. Thomas (Supra)* :-

"26. The scheme of the prosecution in punishing under Section 138 of the Act is different from the scheme of CrPC. Section 138 creates an offence and prescribes punishment. No procedure for the investigation of the offence is contemplated. The prosecution is initiated on the basis of a written complaint made by the payee of a cheque. Obviously such complaints must contain the factual allegations constituting each of the ingredients of the offence under Section 138. Those ingredients are: (1) that a person drew a cheque on an account maintained by him with the banker; (2) that such cheque when presented to the bank is returned by the bank unpaid; (3)

- A *that such a cheque was presented to the bank within a period of six months from the date it was drawn or within the period of its validity whichever is earlier; (4) that the payee demanded in writing from the drawer of the cheque the payment of the amount of money due under the cheque to payee; and (5) such a notice of payment is made within a period of 30 days from the date of the receipt of the information by the payee from the bank regarding the return of the cheque as unpaid.*
- B *It is obvious from the scheme of Section 138 that each one of the ingredients flows from a document which evidences the existence of such an ingredient. The only other ingredient which is required to be proved to establish the commission of an offence under Section 138 is that in spite of the demand notice referred to above, the drawer of the cheque failed to make the payment within a period of 15 days from the date of the receipt of the demand. A fact which the complainant can only assert but not prove, the burden would essentially be on the drawer of the cheque to prove that he had in fact made the payment pursuant to the demand.*
- C *27. By the nature of the offence under Section 138 of the Act, the first ingredient constituting the offence is the fact that a person drew a cheque. The identity of the drawer of the cheque is necessarily required to be known to the complainant (payee) and needs investigation and would not normally be in dispute unless the person who is alleged to have drawn a cheque disputes that very fact. The other facts required to be proved for securing the punishment of the person who drew a cheque that eventually got dishonoured is that the payee of the cheque did in fact comply with each one of the steps contemplated under Section 138 of the Act before initiating prosecution. Because it is already held by this Court that failure to comply with any one of the steps contemplated under Section 138 would not provide "cause of action for prosecution". Therefore, in the context of a prosecution under Section 138, the concept of taking cognizance of the offence but not the offender is not appropriate. Unless the complaint contains all the necessary factual allegations constituting each of the ingredients of the offence under Section 138, the Court cannot take cognizance of the offence. Disclosure of the name of the*
- D *payee is necessary to establish the offence under Section 138 of the Act.*
- E *payee is necessary to establish the offence under Section 138 of the Act.*
- F *payee is necessary to establish the offence under Section 138 of the Act.*
- G *payee is necessary to establish the offence under Section 138 of the Act.*
- H *payee is necessary to establish the offence under Section 138 of the Act.*

person drawing the cheque is one of the factual allegations which a complaint is required to contain. Otherwise in the absence of any authority of law to investigate the offence under Section 138, there would be no person against whom a court can proceed. There cannot be a prosecution without an accused. The offence under Section 138 is person specific. Therefore, Parliament declared under Section 142 that the provisions dealing with taking cognizance contained in the CrPC should give way to the procedure prescribed under Section 142. Hence the opening of non obstante clause under Section 142. It must also be remembered that Section 142 does not either contemplate a report to the police or authorise the Court taking cognizance to direct the police to investigate into the complaint.

28. *The question whether the respondent had sufficient cause for not filing the complaint against Dakshin within the period prescribed under the Act is not examined by either of the courts below. As rightly pointed out, the application, which is the subject-matter of the instant appeal purportedly filed invoking Section 319 CrPC, is only a device by which the respondent seeks to initiate prosecution against Dakshin beyond the period of limitation stipulated under the Act.”*

23. In view of the above, arguments advanced by learned counsel for the appellant that an additional accused can be impleaded subsequent to the filing of the complaint merits no consideration, once the limitation prescribed for taking cognizance of the offence under Section 142 of NI Act has expired. More particularly, in view of the fact that neither any effort was made by the petitioner at any stage of the proceedings to arraign the company as an accused nor any such circumstances or reason has been pointed out to enable the Court to exercise the power conferred by proviso to Section 142, to condone the delay for not making the complaint within the prescribed period of limitation.

24. Reliance placed by learned counsel for the appellant on the decisions of this Court in the case of *Aneeta Hada Vs. Godfather Travels & Tours Pvt. Ltd. (Supra)* is also totally mis-founded inasmuch as the ratio decidendi of the said case runs contrary to the argument advanced by learned counsel for the appellant. It may be relevant to extract the following observations made in paragraph 59 of the reports :-

- A “59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V. Parekh which is a three-Judge Bench decision. Thus, the view expressed in sheoratan Agarwal does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada is overruled with the qualifier as stated in para 51. The decision in Modi Distillery has to be treated to be restricted to its own facts as has been explained by us hereinabove.”

- D 25. As already stated above, a perusal of the complaint goes to show that even though respondent no. 2 has been arrayed as a respondent, but there are no averments that respondent no.2 at the time when the offence was committed was in charge of, and was responsible to the company for the conduct of its business. The averments made in the complaint are being reproduced hereunder :-

“Complainant makes the following written submission:-

- E 1. That the complainant has a firm which deals in all types of materials used in the machineries of factories.
- F 2. Defendant's firm M/s. Ravi Organics Limited is a chemical factory and the materials used in the machinery of defendant-firm are supplied by Complainant. Both the firms have old trade relations and they do business with each other.
- G 3. Defendant gave an account payee cheque bearing no. 802276 of Union Bank of India, Muzaffarnagar of Rs. 1,00,000/- (Rupees ten lakhs) on 20.11.2012 to Complainant against outstanding bill and asked him to produce the same in his bank for encashment after receiving his signal.
- H 4. After laying up claim many times by Complainant, defendant on 15.12.2012 asked the complainant to produce the said cheque in his bank for entrenchment after four-five days, it will be cleared, complainant believed the defendant.

5. On 21.12.2012, Complainant produced the said cheque in his bank State Bank of Patiala, Court Road, Muzaffarnagar for encashment in favour of his A/c No. 55042570994. On 24.12.2012, he was informed by his bank that the cheque amount exceeds arrangement made on 22.12.2012 by defendant's bank i.e., Union Bank of India and thus, the said cheque was dishonoured.

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6. Upon dishonouring the cheque (with the remarks of Exceeds arrangement), complainant issued a registered notice through his advocate to the defendant at his above given address which was received by defendant on 01.01.2013 but even after lapse of 15 days, defendant has not made the above payment to complainant so far.

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7. Defendant-accused deliberately gave the above cheque with intent to grab complainant's money which has been dishonoured in the bank; thus, defendant-accused is guilty of committing offence under Negotiable Instruments Act.

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Therefore, you are requested to summon the accused and punish him with the directions to pay the complainant the double of the above cheque amount under provisions of N.I. Act. Complainant shall remain obliged to you."

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26. The question whether it is 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, was subject matter of reference by a two-Judge Bench of this Court along with other questions to be adjudicated by a larger Bench. The following questions were referred for consideration :-

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"(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 fulfill 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.

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(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 proved to the contrary.

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- A *(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."*
- B 27. A three-Judge Bench in the case of **S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla (Supra)**, considering the aforesaid questions after analysing the provisions of Section 141 of the Act and specially the words "*who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence, etc.*" used in the said Section, observed as under :-
 - D "*While analysing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is committed by a company. The key words which occur in the Section are "every person". These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words :*
 - E "*who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence etc.*"
 - F *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 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*
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liability arises from being in charge of and responsible for 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 conduct of business of a Company at the relevant time. Liability depends on the role one plays in the affairs of a Company and not on designation or status. If being a Director or Manager or Secretary was enough to cast criminal liability, the Section would have said so. Instead of "every person" the section would have said "every Director, Manager or Secretary in a Company is liable" ..etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action.

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

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

28. The three-Judge Bench also took note of the earlier pronouncements of this Court in the case of *State of Haryana Vs. Brij*

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- A ***Lal Mittal & Ors.***⁸, wherein it was held that vicarious liability of a person for being prosecuted for an offence committed under the Act by a company arises if at the material time he was in charge of and was also responsible to the company for the conduct of its business. Simply because a person is a director of a company, it does not necessarily mean that he fulfils both the above requirements so as to make him liable. Conversely, without being a director a person can be in charge of and responsible to the company for the conduct of its business.

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- C 29. The Bench also considered the dictum of this Court in the case of ***K.P.G Nair Vs. Jindal Menthol India Ltd.***⁹, which was also a case under the Negotiable Instruments Act. In the said case, it was found that the allegations in the complaint did not in express words or with reference to the allegations contained therein make out a case that at the time of commission of the offence, the appellant was in charge of and was responsible to the company for the conduct of its business. It was held that requirement of Section 141 was not met and the complaint against the accused was quashed.
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- E 30. After analyzing the aforesaid and various other pronouncements, the three-Judge Bench in paragraph 18 of the reports, observed as under :-

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

⁸(1998) 5 SCC 343

⁹(2001) 10 SCC 218

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.”

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31. The Bench answered the questions posed in the reference as under :-

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

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

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

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- A 32. In view of the undisputed facts of the present case in juxtaposition to the judicial pronouncements of this Court referred to above, we have no hesitation in holding that no error has been committed by the High Court in allowing the Writ Petition filed by the respondent no. 2 and quashing the impugned order and the proceedings.
- B 33. Thus, the impugned orders do not warrant any interference. As a result, the appeals fail and, accordingly, stand dismissed.

Ankit Gyan
(Assisted by : Rahul Rathi, LCRA)

Appeals dismissed.