

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

FRIDAY, THE 31ST DAY OF MARCH 2017/10TH CHAITHRA, 1939

Crl.MC.No. 6985 of 2014 ()

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CC.NO. 22/2014 OF JUDICIAL FIRST CLASS MAGISTRATE COURT -II (MOBILE)
KOZHIKODE
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PETITIONERS/ACCUCSED NO.3 & 4:

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- 1. HEENA VARMA,
W/O RANJITH KUMAR.K.,
KRISHNA LEELA HOUSE, THONICHIRA ROAD,
NORTH BEYPORE, KOZHIKODE.**
 - 2. LEELA, MOTHER OF RANJITH KUMAR,
KRISHNA LEELA HOUSE, THONICHIRA ROAD,
NORTH BEYPORE, KOZHIKODE.**

**BY ADVS.SRI.S.RAJEEV
SRI.K.K.DHEERENDRAKRISHNAN**

RESPONDENTS/COMPLAINANT:

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- 1. STATE OF KERALA,
REP. BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM-682 031.**
 - 2. M/S. ANKUR CHEMEDYES,
REP. BY POWER OF ATTORNEY AGENT PREMARAJAN P.,
AGED 52 YEARS, S/O P.VALEYUDHAN, MARKETING MANAGER,
M/S. ANKUR CHEMEDYES, 7/718 E, M.A.BUILDING,
P.O. KOLATHARA, KOZHIKODE-673 655.**

**R1 BY PUBLIC PROSECUTOR SRI.SAIGI JACOB PALATTY
R2 BY ADVS. SRI.MANJERI SUNDERRAJ
SRI.M.SANJEEVE**

**THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD
ON 31-03-2017, ALONG WITH CRL.MC. NO. 6986/2014 AND
CRL.M.C.NO.2433/2015, THE COURT ON THE SAME DAY PASSED
THE FOLLOWING:**

sts

Crl.MC.No. 6985 of 2014 ()

APPENDIX

PETITIONER(S)' ANNEXURES:

ANNEXURE I: TRUE COPY OF THE PARTNERSHIP DEED DATED 12.10.2011.

ANNEXURE II: CERTIFIED COPY OF THE COMPLAINT DATED 6.12.2013.

RESPONDENT(S)' ANNEXURES:

NIL

/TRUE COPY/

P.S.TO JUDGE

sts

ALEXANDER THOMAS, J.

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Crl.M.C.Nos.2433/2015, 6985/2014 & 6986/2014

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Dated this the 31st day of March, 2017

ORDER

The prayers in these Criminal Miscellaneous Cases are mainly for quashing the impugned complaints filed by the 2nd respondent complainant alleging offence punishable under Sec.138 of the Negotiable Instruments Act, on the ground that there are no sufficient and necessary averments in the impugned complaints that the petitioners, who are co-accused partners of the 1st accused partnership firm, are in charge of and were responsible to the partnership firm for the conduct of the business of the said firm, as envisaged in the mandatory provisions contained in Sec.141(1) of the Negotiable Instruments Act, 1881. The 2nd respondent is the complainant and the petitioners are accused 3 and 4 in all the 3 impugned complaints concerned with these three matters. Accused 1 and 2 in those complaints are the partnership firm as well as the individual, who is the managing partner of the said firm. Since the issues are common and as the complaints are identically worded, these matters are disposed of as per this common order. Crl.M.C.No. 2433/2015 is taken as the leading case and the brief of the factual aspects in these matters is given below.

2. The gist of the prosecution allegation is that on account of

the dues arising out of the business transaction between the complainant and the 1st accused partnership firm, the 2nd accused, who is the managing partner of the 1st accused partnership firm, had issued 3 cheques (which were dishonoured on account of insufficiency of funds) and that after necessary compliance with the requisite statutory formalities, the impugned complaints (which have been marked as Anx.II in each of these cases) have been filed and the learned Magistrate had taken cognizance on the basis of the impugned Anx.II complaint. In Crl.M.C.No. 2433/2015 the dishonoured cheque in question is for an amount of Rs.1 lakh dated 3.7.2013 and this led to the institution of C.C.No.1239/2014 on the file of the Judicial First Class Magistrate's Court-V, Kozhikode. The cheque involved in Crl.M.C.No. 6986/2014 is for Rs. 3,14,762/- dated 9.8.2013, which has led to the pendency of C.C.No.269/2014 on the file of the Judicial First Class Magistrate's Court-V, Kozhikode. Whereas the cheque in question involved in Crl.M.C. No.6985/2014 is for an amount of Rs. 10,21,851/- dated 17.9.2013, which has led to the institution of C.C.No. 22/2014 on the file of the Judicial First Class Magistrate's Court-II (Mobile), Kozhikode. It appears that the dishonoured cheques in question have been issued from an account maintained by the 1st accused partnership firm and the cheques have been signed and executed by the 2nd accused, who is the managing partner of the 1st accused partnership firm. Accused 1 and 2 have not

been arrayed as respondents in these Crl.M.Cs. The 2 petitioners herein are the wife and mother of the 2nd accused, who is the managing partner of the firm. The petitioners herein are sought to be roped in as accused on the basis of the corporate vicarious liability as envisaged in Sec.141 of the Negotiable Instruments Act.

3. The relevant averments in these impugned complaints (which are more or less identically worded) to the extent it purport to concern the corporate vicarious liability of accused 3 and 4 (2 petitioners herein) are as follows: – It is averred that the complainant is a partnership, which deals with chemical for the manufacturing of chappals, etc. and that the 1st accused is the partnership firm and is represented by its managing partner, who is the 2nd accused, and that the other accused, viz., accused 3 and 4 (2 petitioners herein) are the active partners of the firm and of its operation. It is further averred that the 1st accused firm named as “*M/s.Prestige Polymer Product*” is the manufacturer of chappals and used to purchase chemicals from the complainant firm on credit basis and during the relevant time, in respect of each of these cases, for the outstanding balance amount owed to the complainant firm by the 1st accused partnership firm, the cheques in question have been issued and executed by the 2nd respondent accused, who is the managing partner of the 1st accused firm. It may be relevant to refer to paras 2 to 6 of the impugned Anx.A-II complaint in Crl.M.C.No. 2433/2015, which read as

follows:

“2. The complainant is a partnership firm deal with chemicals for the manufacturing of chapels, represented by its Power of attorney holder Mr.Premarajan, Notarized copy of power of attorney is produced herewith as document No.1.

3. The first accused is the partnership firm and is represented by the Managing Partner, the second accused. Other accused, he (sic) accused No.3 and 4 are the active partners of the firm and of its operations.

4. The first accused firm, named as Prestige Polymer Product, is the manufacturer of chapels. They used to purchase chemicals from the complainant firm on credit basis.

5. During the month of September, 2013 Rs.13,22,769/- (Rupees Thirteen Lakhs Twenty Two Thousand Seven Sixty Nine Only) was pending as outstanding balance amount to the complainant firm by the accused.

6. In discharge of the said liabilities owing to the complainant, the accused firm issued a cheque bearing No.2071 dated 03/07/2013 for an amount of Rs. 1,00,000/- (Rupees One Lakh Only). The cheque was signed and issued by the second accused in the capacity as the Managing Partner of the first accused firm, drawn on the State Bank Of Travancore, Beypore branch, on a promise that on presenting the said cheque complainant will be able to encash the same.”

The complaints in the other 2 cases are also more or less identically worded.

4. It is contended by Sri.S.Rajeev, learned Advocate, instructed by Sri.K.K.Dheerendra Krishnan, learned counsel appearing for the petitioners in these 3 cases that the only averment in these complaints for attempting to rope in the 2 petitioners for the corporate vicarious liability under Sec. 141 of the Negotiable Instruments Act is that accused 3 and 4 (2 petitioners herein) are active partners of the firm and of its operation and that apart from these averments, there are no other averments about the role and involvement of these 2 petitioners herein.

It is contended by the petitioners that it has been well established by a catena of rulings of the Apex Court as well as various High Courts that there should be clear and cogent averments in the impugned complaints alleging offence punishable under Sec.138 of the Negotiable Instruments Act against the co-accused directors and partners of the principal accused company/partnership firm that such directors/partners/officials of companies/partnership firms and such other corporate entities as envisaged in Sec.141 of the Negotiable Instruments Act, should be persons, who were in charge of and were responsible to the companies/partnership firms/corporate entities concerned for the conduct of the business of the said company/partnership firm, etc, and that such averments should necessarily find a place in the complaint for roping in the corporate vicarious liability, and otherwise no offence under Sec.138 of the Negotiable Instruments Act will be made out as against such co-accused directors or partners, etc. where the drawer of the dishonoured cheque in question is a company/partnership firm, etc.

5. Whereas Sri.Manjeri S.Sunder Raj, learned counsel appearing for the 2nd respondent complainant would contend that the averments in the impugned Anx.II complaints are sufficient and necessary for roping in the petitioners for the corporate vicarious liability under Sec.141 of the Negotiable Instruments Act. Further both sides have also made certain submissions on the basis of Anx.A-1 partnership deed in respect of the

1st accused partnership firm in their attempt to fortify their respective contentions. Whereas Sri.S.Rajeev, learned counsel appearing for the petitioners places reliance on clause 7 of Anx.1 deed. Sri.Manjeri S.Sundar Raj, learned counsel appearing for the 2nd respondent complainant would place reliance on clause 8 of Anx.1 deed. This Court had made it clear during the hearing that in the nature of the factual scenario arising in these cases, this Court would only go by the well established judicial perspective based on the precedents from the celebrated judgment in R.P.Kapoor v. State of Punjab, reported in AIR 1966 SC 866 onwards, wherein it has been consistently held that "*where the allegations made in the complaint, even if they are taken at the face value and accepted in their entirety, do not prima facie constitute any offence or make out a case against the accused, the complaint is liable to be quashed at the threshold in the exercise of the inherent jurisdiction conferred on the High Court as per the provisions contained in Code of Criminal Procedure*". On this basis, this Court is only proposing to proceed on the basis as to even if the entire allegations in the impugned complaints are taken at its face value, whether it make out an offence under Sec.138 of the Negotiable Instruments Act against the 2 petitioners herein and in view of this aspect, this Court is not proposing to go into any materials like Anx.1 deed of partnership, constituting the 1st accused partnership firm, which has been produced by the petitioners, as such a material was not available with the learned Magistrate at the time of

taking cognizance in these cases. Therefore, this Court is not examining any documents, which were not under the consideration of the learned Magistrate at the time of taking of cognizance.

6. Heard Sri.S.Rajeev, learned Advocate instructed by Sri.K.K.Dheerendra Krishnan, learned counsel appearing for the petitioners, Sri.Manjeri S.Sunder Raj, learned counsel appearing for the 2nd respondent, and Sri.Saigi Jacob Palatty, learned Prosecutor appearing for R-1 State.

7. In a case involving commission of offence punishable under Sec. 138 of the Negotiable Instruments Act, the drawer of the dishonoured cheque in question is the offender, who is said to have committed the said offence. But where the drawer of the cheque is not an individual, but is a corporate entity as envisaged in Sec. 141 of the Negotiable Instruments Act, like company/partnership firm, etc., then the matters in respect of the corporate vicarious liability of such persons other than the drawer institution, are regulated by the provisions contained in Sec.141 of the Negotiable Instruments Act. Therefore, it would be profitable to make a brief reference to Sec.141 of the Negotiable Instruments Act, which reads as follows:

“Sec.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."

8. The Apex Court in the celebrated judgment in S.M.S. Pharmaceuticals v. Neeta Bhalla & Anr. reported in (2005) 8 SCC 89, has held that 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 and a liability under Sec.141 of the Negotiable Instruments Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself and it is a departure from the rule in criminal law against various liability and therefore a clear case should be spelled out in the complaint against the person sought to be made liable. That under Sec.

141 what is required is that the persons who are sought to be made criminally liable 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 that provision and 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, will be liable for criminal action and the liability arises on account of conduct, act or omission on the part of a person not merely on account of holding an office or a position in a company (see paras, 4, 10, 12 and 18 of SCC report). Therefore, it has been unequivocally and categorically held by the Supreme Court that in order to bring a case within the ambit of Sec. 141 of the Act, the complaint must disclose the necessary facts, which make a person liable and it is necessary to specifically aver in a complaint that at the time the offence was committed, the person accused was in charge of and responsible for the conduct of the business of the company/ partnership firm. This averment is an essential requirement under Sec. 141 of the Negotiable Instruments Act and has to be made in a complaint and without this averment being made in a complaint, the requirements of Sec.141 cannot be said to be satisfied [see para 19(a) of the SCC report]. It has thus been held that every person connected with the company shall not fall within the ambit of the provision and is only those

persons, who were in charge of and responsible for the conduct of the business of the company at the time of the commission of the offence, would be liable to face prosecution and the liability arises from being in charge of and responsible for the conduct of the business of the company at a relevant time, when the offence was committed and not on the basis of merely holding a designation or office in a company. So conversely a person, not holding any office or designation in a company is still be liable, if he satisfies the main requirement of being in charge of and responsible for the conduct of the company at the relevant time and so the liability depends on the role one plays in the affairs of the company and not merely on the basis of the designation or status. It has also been held that the relevant provisions of the Companies Act would also show that there is nothing to suggest that simply by being a director in a company, one is supposed to discharge particular functions on behalf of a company and the role of a director in a company is a question of fact, depending on the peculiar facts in each case and there is no universal rule that a director of a company is in charge of every day affairs and there is no magic as such in a particular word, be it director or manager or secretary and it all depend upon the respective roles assigned to the officials in a company. It has been categorically held that merely being a director/partner of a company/partnership firm is not sufficient to make such a person liable under Sec.141 and such a director

cannot be deemed to be in charge of and responsible to the company for the conduct of the business and requirement of Sec.141 is that the person sought to be so made liable should be actually in charge and responsible for the conduct of the company at the time of commission of the offence under Sec.138 of the Negotiable Instruments Act. Therefore, this aspect has to be averred as a fact as there is no deemed liability of a director in such cases and a director, who was not in charge of and was responsible for the conduct of the business of the company at the relevant time will not be liable under that penal provision. However, it has also been made it clear by the Apex Court that in the case of officials like managing director or joint managing director of a company or signatory of a cheque, such a person could be proceeded against even in the absence of specific averments in the complaint that they were in charge of and responsible for the conduct of the business of the company at the relevant time.

9. The matter in S.M.S. Pharmaceuticals' case *supra*, arose on a reference made to a larger 3-judge Bench by a 2-judge Bench of the Apex Court and the questions that had been considered by the 3-judge Bench and answered thereto, have been dealt with in paragraphs 1 and 19 of the abovesaid S.M.S. Pharmaceuticals' case, which read as follows:

“This matter arises from a reference made by a two-Judge Bench of this Court for determination of the following questions by a larger Bench:

“(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.

(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.

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

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

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

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

dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141.”

10. In the judgment in N.K.Wahi v. Shekhar Singh & Ors. reported in (2007) 9 SCC 481, their Lordships of the Supreme Court have clearly held in para 8 thereof that the requirement for launching a prosecution under Sec.138 on the basis of vicarious liability of director/ official of the company/firm is that there must be specific allegations in the complaint as to the part played by them in the transaction and the allegation should be clear and unambiguous as to how the directors were in charge of and responsible for the conduct of the business of the company and that the description should be clear. It has also been held that the precise words from the provisions of the Act need not be reproduced in the complaint and on the basis of the necessary and sufficient averments the court should be able to conclude on the facts in each case as to whether the director/official of the company was in charge of and responsible for the conduct of the business of the company, etc. at the time of commission of the offence. Para 8 of N.K.Wahi 's case supra reads as follows:

“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.”

11. In N.K.Wahi's case supra the Apex Court has dealt with a criminal complaint under Secs.138 and 141 of the Negotiable Instruments Act, wherein it was averred that the 1st accused company is a limited company and the respondents and some others were directors/persons responsible for carrying on the business of the company and the liability of this company is joint and several, etc. Though the learned Magistrate had dismissed the application for dropping the charges, the High Court of Delhi held that the preliminary evidence does not establish that the respondents were either in charge or were responsible to the company for the conduct of the business and in the absence of such evidence or assertion, it was held that magistrate was not justified in issuing summons to the respondents therein. In the light of the abovesaid legal position, the Apex Court in N.K.Wahi 's case supra held that the appeal preferred by the complainants were without any merits and it upheld the decision in the judgment of the Delhi High Court, quashing the impugned complaint as against the respondents therein.

12. The matter has been considered in the case in Sabitha Ramamurthy v. R.B.S. Channabasavaradhya reported in (2006) 10 SCC 581, p.585, para 7), which reads as follows:

“7.....Section 141 raises a legal fiction. By reason of the said provision, a person although is not personally liable for commission of such an offence would be vicariously liable therefor. Such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned only if the requisite statements, which are required to be averred in the complaint petition, are made so as to make the accused therein vicariously liable for the

offence committed by the company. Before a person can be made vicariously liable, strict compliance with the statutory requirements would be insisted.”

13. In Central Bank of India v. Asian Global Limited & Anr. reported in (2010) 11 SCC 203, the Apex Court has again reiterated that merely being a director would not by itself make a person liable for offence committed by a company and for launching prosecution against a director of a company under Sec.138/141 of the Negotiable Instruments Act, there has to be specific allegation in the complaint with regard to the part played by them in the transaction in question and the allegation has to be clear and unambiguous showing that the directors were in charge of and responsible for the conduct of the business of the company. In that case, except that a statement in the complaint that the respondents therein and some of the other accused, were directors of the accused companies and were liable for the acts of the companies, no specific allegation was made against any one of them and therefore it was also held that the question of proving a fact, which was not mentioned in the complaint, does not arise. In these circumstances the Apex Court held that the impugned judgment of the High Court therein quashing the complaint against the respondents therein, is correct. It would be profitable to refer to paras 17 and 19 of the judgment in Central Bank of India's case supra, which read as follows:

“17. The law as laid down in S.M.S. Pharmaceuticals Ltd. case [(2005)8 SCC 89] has been consistently followed and as late as in 2007,

this Court in N.K. Wahi case [(2007) 9 SCC 481] while considering the question of vicarious liability of a Director of a company, reiterated the sentiments expressed in S.M.S. Pharmaceuticals Ltd. case [(2005)8 SCC 89] that merely being a Director would not make a person liable for an offence that may have been committed by the company. For launching a prosecution against the Directors of a company under Section 138 read with Section 141 of the 1881 Act, there had to be a specific allegation in the complaint in regard to the part played by them in the transaction in question. It was also laid down that the allegations had to be clear and unambiguous showing that the Directors were in charge of and responsible for the business of the company. This was done to discourage frivolous litigation and to prevent abuse of the process of court and from embarking on a fishing expedition to try and unearth material against the Director concerned.

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19. Admittedly, except for the aforesaid statement, no other material has been disclosed in the complaint to make out a case against the respondents that they had been in charge of the affairs of the Company and were responsible for its action. The High Court, therefore, rightly held that in the absence of any specific charge against the respondents, the complaint was liable to be quashed and the respondents were liable to be discharged."

14. In the judgment in Mannalal Chamaria & Anr. v.State of West Bengal & Anr. reported in AIR 2014 SC 2240 = 2014 (2) KHC 167, it has been held that where the prosecution has been sought against directors of the company under Sec.138/141 of the Negotiable Instruments Act, it has been held that the failure to state in the complaint that directors/accused persons were in charge of and responsible for the conduct of the business of the company at the relevant time, is a sufficient ground for dismissing the complaint. In that case, after the dishonour of the cheques drawn from the account of the company the complainant had preferred complaint against the company and one director under Secs.138 and 141 and during the pendency of the

proceedings, the individual director had died and thereafter the complainant had moved an application for impleading the other directors of the company, which was allowed and the appellants were impleaded as accused persons and summons issued to them, aggrieved by which the said impleaded accused directors had preferred revisions before the Calcutta High Court, which dismissed the petitions and the order of the Calcutta High Court was challenged before the Supreme Court on the ground that no specific allegations were made against them therein either in the original complaint or in the amended complaint. Accepting this plea, the Apex Court has held in paras 8 to 10 of the said judgment as follows:

'8. We have been taken through both the complaints by learned counsel for the appellants and find that there is no allegation worth the name against any of the appellants in either of the complaints. Insofar as the first complaint is concerned, the appellants were not even made parties and therefore there is no question of any allegations being made against them in that complaint. As far as the second complaint is concerned, the only allegation made is to be found in paragraph 6 thereof which reads as follows:

"That in this context your petitioner refers to the provisions of S.141 of the Negotiable Instrument Act, where it has been specifically stated that if the offender is the company then the person who at the time of the offence was committed was in - charge of and was responsible to the company for the conduct of the business of the company, other Directors, Manager, Secretary or other officers of the company shall be guilty of the offence, unless the persons referred to above prove otherwise, as per the saving clause of the said Section. In S.5 of the Companies Act, also made those officers responsible for crime committed by the company."

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.*, MANU / SC / 1081/2013. 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 S.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.

10. Under these circumstances, the complaint against the appellants deserves dismissal. A contrary view taken by the High Court cannot be accepted. Accordingly, the appeals are allowed and the order passed by the High Court is set aside.'

15. In *K.Pooja Ravinder Devidasani v. State of Maharashtra & Anr.* reported in (2014) 16 SCC 1, the Apex Court has held that in the case where the appellant director had resigned much before issuance of the dishonoured cheques, and the appellant's resignation was also accepted by the Board of Directors and the formalities of informing the Registrar of Companies about the resignation were also fulfilled. In the entire complaint no specific role was attributed to the appellant for commission of offence and she was only a non executive director of the company and the cheques in question were issued by virtue of a letter of guarantee and it was held that at the most the letter of guarantee gave way for a case of civil liability. In these circumstances, the Apex Court held that the continued prosecution of such a former director is nothing but sheer abuse of the process of the court. The Apex Court held that based on uncontrovertable and unimpeachable materials of sterling quality, the court would be justified in quashing the complaint against such an accused who was no longer the director of the

company even at the time of issuance of the dishonoured cheques in question. It was also held in para 20 of the said judgment in K.Pooja Ravinder Devidasani's case *supra* that the law laid down by the Apex Court is that for making a director of a company liable for offence committed by the company under Sec.141 of the Act, there must be specific averments against the director, showing as to how and what manner the director was responsible for the conduct of the business of the company. It was also held by the Apex Court in paras 22 and 30 of K.Pooja Ravinder Devidasani's case *supra*, as follows:

“22. As held by this Court in *Pepsi Foods Ltd. v. Judicial Magistrate* [(1998) 5 SCC 749], summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. 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. The 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.

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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 Sections 138/141 of the NI Act, making a person vicariously liable has to ensure strict compliance with 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.”

16. On the abovesaid aspects, it will be profitable to refer para 5 of the decision in S.M.S. Case supra (see SCC report – p.96– para 5), which reads as follows:

“5. Section 203 of the Code empowers a Magistrate to dismiss a complaint without even issuing a process. It uses the words “after considering” and “the Magistrate is of opinion that there is no sufficient ground for proceeding”. These words suggest that the Magistrate has to apply his mind to a complaint at the initial stage itself and see whether a case is made out against the accused persons before issuing process to them on the basis of the complaint. For applying his mind and forming an opinion as to whether there is sufficient ground for proceeding, a complaint must make out a prima facie case to proceed. This, in other words, means that a complaint must contain material to enable the Magistrate to make up his mind for issuing process. If this were not the requirement, consequences could be far-reaching. If a Magistrate had 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 is issued would be tremendous. Even Section 204 of the Code starts with the words “if in the opinion of the Magistrate taking cognizance of an offence there is sufficient ground for proceeding”. The words “sufficient ground for proceeding” again suggest that ground should be made out in the complaint for proceeding against the respondent. 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 allegations in the complaint or the charge-sheet do not constitute an offence against a person, the complaint is liable to be dismissed.”

17. A slightly different note appears to have been struck by the Apex Court in the judgment in Tamil Nadu News Print and Papers Ltd. v. D.Karunakar & Ors. reported in (2016) 6 SCC 78. Therein the only averment in the impugned complaint was that accused 2 to 9 therein were directors and were in day to day management of the accused company, etc. The High Court allowed the petition filed under Sec.482 of the Cr.P.C. for quashing the complaints on the ground that such averments, which do not specifically disclose the role played by the accused directors, will not be sufficient to rope in vicarious liability, etc.

The Apex Court held that since there was an averment in the complaint that appellants therein were in charge of the day to day business of the 1st accused company, the High Court went wrong in quashing the complaint under Sec.482 stage, etc. But the view taken in the Tamil Nadu News Print & Papers Ltd.'s case supra appears to be on the facts and circumstances of that case.

18. In yet another judgment in National Small Industries Corporation Ltd. v. Harmeet Singh Paintal and Anr. reported in (2010) 3 SCC330, the Apex Court has held in para 39 (pp.345–356) thereof as follows:

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

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

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

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

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

(v) If the accused is a Managing Director or a Joint Managing Director then it is not necessary to make specific averment in the

complaint and by virtue of their position they are liable to be proceeded with.

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

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

19. This Court in the case in Susan Zachariah & Ors. v. M/s. Muthoot Capital Services Ltd. reported in 2012 (3)KLT 843 = 2012 (3) KHC 870 = ILR 2012 (4) Ker.74, had occasion to deal with a case wherein the partners of the 1st accused partnership firm were sought to be made co-accused on account of the alleged vicarious liability under Sec.141 of the Negotiable Instruments Act with the averment that the cheque was issued with the "*consent*" and "*connivance*" of all partners and this Court after elaborate discussion on the case laws on the subject held that those averments would not be sufficient to array all the partners as accused and that such co-accused partners of the firm cannot be arrayed as accused, without stating the role of each partners and facts constituting the offence, etc.

20. Kanakamma Kunjamma.B. v. State of Kerala & Anr. reported in 2014 KHC 229 = 2014 (1) KLD 882 = 2014 (3) KLJ 100, had dealt with an impugned complaint therein, wherein it was averred that accused 2 and 3 were managing the affairs of the 1st accused company and that it was they who had issued the disputed cheque and except in the cause-

title, nowhere in the complaint was it mentioned regarding the status of the petitioner in the 1st accused company and the role in the transaction between the 1st accused company and the complainant and in the issuance of the cheque. In these circumstances, this Court held that due to the absence of sufficient and necessary averments in the complaint, the same is liable to be quashed.

21. In the case Rajagopalan P. v. P.C.Jose & Anr. reported in 2016 (2) KHC 559 = 2016 (1) KLD 696 = 2016 (2) KLJ 301 = 2016 (2) KLT SN 32 = ILR 2016 (2) Ker.432, this Court had dealt with a case where a dishonoured cheque was issued by the 1st accused company and accused No.2 was the managing director and accused No.3 was the director in charge and the 3 petitioners therein, who were (accused 4 to 6 therein) were alleged to be the directors. It was averred that all of them were responsible for the day to day affairs of the 1st accused company, which was engaged in the business of currency trading, for ex trading, commodity trading, etc. After scanning the case law on the subject, this Court held that the substratum of the prosecution case as against the petitioners therein was on a very weak edifice and therefore it was held that the continuance of the prosecution is nothing but an abuse of the process of the court and had therefore ordered quashment of the impugned complaint to the extent it related to the 3 petitioners therein, who were accused 4 to 6 in the complaint.

22. In *A.K.Singhania v. Gujarat State Fertilizer Co. Ltd.*, (2013) 16 SCC 630, the Apex Court has dealt with the prayers for quashment of complaints under Secs.138 and 141 of the Negotiable Instruments Act. The averments in Complaint Case No.331 of 1996 dealt with in para 3 of *A.K.Singhania's* case supra reads as follows: – *“Accused 14 is a limited company registered under the Companies Act, 1956 and are doing business of chemicals, synthetics, etc. Accused 1 is Managing Director of the accused Company 14 and Accused 2 is Deputy Managing Director, Accused 3 is Chairman, Accused 4 is whole-time Director, Accused 5 is Finance Director, Accused 6 to 12 are the Directors and Accused 13 was Senior Manager (Finance) of the accused Company 14 Esslon Synthetics Ltd. All the business and financial affairs of the accused Company 14 are decided, organised and administered by Accused 1 being Managing Director and Accused 2 being Deputy Managing Director, Accused 3 Chairman, Accused 4 whole-time Director, Accused 5 Finance Director with consultation of other Directors from Accused 6 to 12 and Accused 13 was Senior Manager (Finance) of the accused Company 14. So Accused 1 to 12 and Accused 13 are also responsible for all the transactions and business affairs done on behalf of the accused Company 14 and are responsible for all the financial affairs and administration of the accused Company 14.”* The parties concerned, *A.K.Singhania* and *Vikram Prakash* were arrayed as accused Nos.8 and 10 in the above complaint.

23. The averments in Complaint Case No.1293 of 1996, dealt with in para 4 of A.K.Singhanian's case supra reads as follows:- *“All the business and financial affairs of the accused Company 1 are decided, organised and administered by Accused 2 being Managing Director and Accused 3 being Managing Director, Accused 4 Chairman, Accused 5 whole-time Director, Accused 6 Finance Director with consultation of other Directors from Accused 7 to 13 and Accused 14 was Senior Manager (Finance) of Accused 1. At the time the offence was committed, they were in charge of and were responsible to the Company for the conduct of the business of the accused Company. Therefore, they are responsible for day-to-day affairs and all the transactions and business done on behalf of the accused Company 1 and they are also responsible for all the financial affairs and administration of the accused Company 1.”* The parties concerned, A.K.Singhanian and Vikram Prakash were arrayed as accused Nos.7 and 9 in the above complaint.

24. The factual aspects in relation to the abovesaid complaints are given with more details in para 11 of the A.K.Singhanian's case supra, which reads as follows:-

'11. In view of the rival submissions, we proceed to consider the exact allegations made against the accused A.K. Singhanian and accused Vikram Prakash. It is not in dispute that allegations against both the accused in different complaints are one and the same:

11.1. In Complaint Case No. 331 of 1996, the allegation is that *“all business and financial affairs of the accused Company are decided, organised and administered by Accused 1 to 5”*. It has further been alleged that Accused 1 to 5 do so with consultation of other Directors, namely, Accused 6 to 12. In

view of the aforesaid, according to the complainant, Accused 1 to 13 are also responsible for all the transactions and business affairs, financial affairs and administration done on behalf of the accused Company. It is relevant here to state that A.K. Singhania and Vikram Prakash are Accused 7 and 9 in this complaint. The averments made in the complaint nowhere suggest that these two accused, at the time the offence was committed, were in charge of and responsible for the conduct of the business of the Company. According to the complainant itself, it was Accused 1 to 5 who were taking decisions and the allegation that in taking the decisions they used to consult these accused also will not mean that these two accused were at the time the offence was committed, in charge of and responsible for the conduct of the business of the Company.

11.2. In Complaint Case No. 1293 of 1996 and all other complaints with which we are concerned in the present appeals the allegation is that *"all business and financial affairs of the accused Company 1, are decided, organised, administered by Accused 2 to 6 and in consultation of other Directors i.e. from Accused 7 to 13"*. It has further been averred that at the time the offence was committed *"they were in charge of and responsible to the Company for the conduct of the business"* and, therefore, *"they are responsible for day-to-day affairs and transaction, business and all financial affairs of the accused Company"*.

11.3. Mr Ranjit Kumar submits that the aforesaid averments are not sufficient and from that it cannot be inferred that accused A.K. Singhania and accused Vikram Prakash have been alleged to be in charge of and responsible for the conduct of the business of the Company at the time the offence was committed. He points out that A.K. Singhania is Accused 8 whereas accused Vikram Prakash is Accused 10 in these complaints. Mr Jayant Bhushan, however, joins issue and submits that the substance of the accusation clearly indicates that the two accused were in charge of and responsible for the conduct of the business of the Company at the time of the offence.'

25. After assessing the factual aspects, their Lordships of the Supreme Court held that it is difficult to infer that there is any averment that the two accused therein were in charge of and responsible for the conduct of the business of the company at the time the offence was committed and the allegations in the complaints in sum and substance mean that business and financial affairs of the company used to be decided, organised and administered by accused 2 to 6, while doing so,

other Directors including the two accused were consulted and the inference drawn by the complainant on that basis that these two accused, therefore, are in charge of and responsible to the company for the conduct of its business, is absolutely misconceived and that therefore it was held that essential averment in the complaints is lacking. Accordingly, it was held by the Apex Court that since there is no averment that the 2 accused therein were in charge of and responsible for the conduct of the business of the company at the time the offence was committed, the prosecution against those 2 accused cannot be allowed to be continued. It would also be profitable to refer to para 14 of the A.K.Singhanian's case *supra* (see SCC report p.638), which reads as follows:

"14. From a plain reading of the aforesaid provision it is evident that every person who at the time the offence was committed was 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 in charge of and responsible for the conduct of the business of the company? In our opinion, in the case of offence by the company, to bring its Directors within the mischief of Section 138 of the Act, it shall be necessary to allege that they were in charge of and responsible to the conduct of the business of the company. It is a necessary ingredient which would be sufficient to proceed against such Directors. However, we may add that as no particular form is prescribed, it may not be necessary to reproduce the words of the section. If reading of the complaint shows and the substance of accusation discloses 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 issuance of cheque. Section 141 of the Act makes the Directors in charge of and responsible to the 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. We cannot read more than what has been mandated in Section 141 of the Act."

26. Now coming back to the facts of this case, it is to be seen that the only averment in these 3 complaints as against the 2 petitioners herein, who are accused Nos.2 and 4, is to the effect that "*the other accused, accused 3 and 4, are active partners of the firm and of its operations*". As a matter of fact, the only averment as against the petitioners as made out in the complaint impugned in Crl.M.C.No. 6985/2014 is only that "the first accused is the partnership firm, is represented by the managing partner, the second accused, other accused are the active partners in the firm". The relevant averments in each of these complaints as regards the role of the 2 petitioners herein (accused 3 and 4) are as follows:-

(Para 3 of the impugned complaint in Crl.M.C.No.2433/2014):

"3. The first accused is the partnership firm and is represented by the Managing Partner, the second accused. Other accused, the accused No.3 and 4 are the active partners of the firm and of its operations."

(Para 2 of the impugned complaint in Crl.M.C.No. 6985/2014):

"2. The first accused is the partnership firm is represented by the managing partner, the second accused other accused are the active partners of the firm."

Para 3 of the impugned complaint in Crl.M.C.No.6986/2014:

"3. The first accused is the partnership firm and is represented by the Managing Partner, the second accused. Other accused, the accused No.3 and 4 are the active partners of the firm and of its operations."

27. Going by the abovesaid well established legal principles laid down by the Apex Court and by this Court, this Court has no hesitation to hold that the abovesaid averments will not constitute sufficient and

necessary averments for roping in the corporate vicarious liability as against the 2 petitioners herein. No attempt has been made whatsoever by the complainant to make any averments as to the role and functions of the petitioners in the functioning of the business affairs of the partnership firm in question, etc. In the light of these aspects, the irresistible conclusion is that due to the absence of necessary and sufficient averments on the abovesaid aspects, the prosecution cannot be continued as against the 2 petitioners herein. In this view of the matter, the impugned complaints in C.C.No. 1239/2014 on the file of the Judicial First Class Magistrate's Court-V, Kozhikode, C.C.No. 269/2014 on the file of the Judicial First Class Magistrate's Court-V, Kozhikode and C.C.No. 22/2014 on the file of the Judicial First Class Magistrate's Court-II (Mobile), Kozhikode, to the extent it array the 2 petitioners herein as accused 3 and 4, will stand quashed. It is made clear that the said complaints to the extent it affect accused 1 and 2 therein would proceed further, in accordance with law.

With these observations and directions, the aforecaptioned Criminal Miscellaneous Cases will stand finally disposed of.

sd/-
ALEXANDER THOMAS, JUDGE
sdk+
///True Copy///

P.S. to Judge

Cr1.M.C.6985/14 etc.

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