Reportable

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

Criminal Appeal No.1446 of 2021

Sunil Todi & Ors. … Appellants

Versus

State of Gujarat & Anr. … Respondents

And With

Criminal Appeal No.1447 of 2021

J U D G M E N T

Dr Dhananjaya Y Chandrachud, J

1. A Single Judge of the High Court of Gujarat dismissed the petitions under Section 482 of the Code of Criminal Procedure, 1973[1], instituted by the appellants to quash the criminal complaint[2] instituted by the second respondent for offences punishable under Section 138 of the Negotiable Instruments Act, 1881[3], and challenge an order of summons dated 3 November 2017 of the JMFC Mundra on the complaint. The complaint arises from the dishonour of a cheque in the amount of Rs.2,67,84,000/-. In the two appeals which arose from the order of the High Court, the appellants are respectively, four Directors[4] and the Managing Director[5] of a company by the name of R.L. Steels & Energy Limited[6].

2. The background in which the controversy has arisen needs to be noticed. On 19 December 2015, a Letter of Intent was issued by the company to the second respondent for providing uninterrupted power supply at the plant of the company situated at Aurangabad in Maharashtra. Clause (k) of the Letter of Intent envisages that all payments would be made within sixty days through a Letter of Credit[7] to be opened by the company. On 29 April 2016, an email was addressed by the company stating that payment security would be by cheque for

[1] **"CrPC"**
[2] CC No. 1220 of 2017
[3] **"NI Act"**
[4] SLP (Crl) 6590/ 2019
[5] SLP (Crl) 6995/2019
[6] **"Company"**
[7] **"LC"**

an amount equivalent to the quantum of energy to be scheduled for forty-five days. Payments for monthly billing were to be made by LC within seven days of the receipt of bills. This was agreed upon in a communication dated 30 April 2016 addressed on behalf of the second respondent. On 30 June 2016, the company addressed a communication to the second respondent that it was issuing two cheques "only for security deposit" and that the cheques were to be deposited "after getting confirmation only". The details of the cheques were :

Cheque No.	Amount
013287	13392000/-
013286	26784000/-

3. A cheque post-dated 28 August 2017 in the amount of Rs.2,67,84,000/- was accordingly issued with the following endorsement on its reverse: "to be deposited after confirmation only for security purpose". The power supply commenced from 1 July 2016. On 4 July 2016, the company addressed a communication to its banker, Karur Vysya Bank, requesting to stop payment of the above two cheques. On 24 July 2016, a Power Supply Agreement[8] was entered into between the second respondent and the company. The agreement envisages that the company would make payment to the second respondent on the tenth day of every calendar month by a LC. Clause 2.5.1 of the agreement stipulated thus:

> "2.5.1 The Member Consumer shall on the date of execution of this Agreement or not later than 30 (thirty) days prior to the

[8] **"PSA"**

> Date of Commencement of Supply furnish to GENERATOR an BG/postdated cheque of 45 days energy bill, in a form and substance acceptable to the Generator, for an amount equal to energy charge payable for the Contracted Capacity, from any Indian Bank acceptable to the Generator."

4. The relevant terms of the Power Supply Agreement were as follows:

(a) Letter of Credit - Under Clause 2.5, the company was required to make payments for the power supply through LCs'. Clause 2.6 envisages that the Company would issue a LC in accordance with the requirements of the second respondent's Bank;

(b) Payment Date and Delay Penalty– Under Clause 2.7, the Company was required to make payment on the tenth day of every month; in default of which a late payment charge of fifteen per cent per annum would be payable;

(c) Default in Payments – Clause 8.2 provided that parties would be bound by the obligations even in the case of a dispute, unless there was a failure of payment without justification; and

(d) Entire Agreement – Clause 14 provided that the PSA shall represent the entire agreement, and supersede and extinguish any previous drafts, agreements or understandings.

5. On 10 August 2016, 12 September 2016 and 27 September 2016, three LCs' favouring the second respondent were issued by Punjab National Bank at the behest of the company.

6. According to the complaint, the LCs' provided by the company were not in the format required by their bankers. The company was stated to have been informed of this position in an exchange of emails in spite of which, it is alleged that it failed to provide LCs in the correct format.

7. On 4 August 2016, the second respondent raised a provisional bill for Rs.1,77,56,157/- for electricity supplied during the period from 1 July 2016 to 31 July 2016. On 27 August 2016, an invoice for Rs.1,66,48,028/- was issued for power supply during the month of July 2016. On 1 September 2016, an invoice was raised in the amount of Rs.2,17,24,875/- for power supplied during August 2016. On 1 October 2016, an invoice was raised in the amount of Rs.2,19,18,186/- for power supplied during September 2016.

8. On 20 October 2016, the company terminated its agreement with the second respondent. The cheque which was issued by the company was deposited on 28 August 2017. On 18 September 2017, a legal notice was issued by the second respondent to the appellants alleging the commission of offences under Section 138 of the NI Act. It was alleged in the notice that according to the ledger maintained by the second respondent in its books of account, a sum of Rs.6,02,91,089/- remained outstanding. The notice alleged that the appellants had issued a cheque dated 28 August 2017 drawn on Karur Vysya Bank, Aurangabad which had been dishonoured for the reason of 'payment stopped by drawer'. A reply dated 5 October 2017, was addressed in response to the legal notice. It was stated that the cheque that was issued was only for the purpose of

Security and not for encashment.

9. On 2 November 2017, a criminal complaint was filed by the second respondent in the court of the Additional Chief Judicial Magistrate, Mundra against the appellants seeking issuance of summons and imposition of fine of Rs. 5,35,68,000. An affidavit was filed on 3 November 2017, in support of the complaint. On 6 November 2017, the Magistrate issued summons to the appellants. The appellants instituted petitions under Section 482 of the CrPC for quashing of the criminal complaint. Simultaneously, the complainant filed a Regular Civil Suit for recovery of dues.

10. By the impugned judgment and order dated 24 June 2019, the High Court has dismissed the petitions for quashing the complaint. However, it allowed a petition for quashing filed by a nominee director who was not in-charge of the day-to-day management of the company and by a woman non-executive Director. The reasons that guided the High Court for dismissing the petition are as follows:

(i) The issues pertaining to the issuance of cheques, non-payment of electricity charges, issuance of LCs, among others, are questions of fact. They will have to be decided by the trial court;

(ii) The complaint appears to be genuine. The High Court cannot exercise its jurisdiction under Section 482 CrPC unless it is established that there was an ulterior motive behind the initiation of criminal proceedings; and

(iii) Both civil and criminal proceedings are maintainable on the same set of

facts, as in this case.

11. Mr. Sidharth Luthra and Ms. Meenakshi Arora, learned senior counsel have appeared on behalf of the appellants in support of the appeals. Mr. Mohit Mathur and Ms Rebecca John, learned senior counsel have appeared on behalf of the second respondent. Ms. Aastha Mehta, learned counsel appeared on behalf of the State of Gujarat.

12. Mr. Sidharth Luthra, learned senior counsel has urged three submissions in support of the appeals:

(i) The cheques which were issued to the second respondent were intended at all material times to be a security towards payment. This is evident from the endorsement made on the reverse of the cheque in the amount of Rs.2,67,84,000/- dated 28 August 2017, and is buttressed by the stipulation under PSA that payment was to take place by means of LC. A suit has been instituted by the company against the second respondent in the court of the Civil Judge, Senior Division, RCS 15/2017 in which the defence in the written statement is that:

   a. There was a default by the company in the payment of electricity consumption charges from July to September 2016; and

   b. Though the company had issued LC to cover the dues of the electricity bills/ invoices, it had intentionally avoided to furnish them in terms of the draft LCs' furnished by the bankers of the company. In the suit instituted by the second respondent against the company, being CS 236/2019 before the High Court of Judicature at Madras,

the pleading in paragraph 8 of the plaint is that the cheques were issued by way of security:

> "8. As agreed between the parties, the Defendant thereafter by its issued two cheques bearing Nos.013287 & 013286 of amount of Rs.1,33,92,000/- (One Crore Thirty Three Lakhs and Ninety Two Thousand only) and Rs.2,67,84,000/- (Two Crores and Sixty Seven Lakhs and Eighty Four Thousand Only) respectively as security deposit to the Plaintiff on the condition that the cheques were to be deposited after obtaining permission. The Plaintiff states that the same was accepted, and the condition was further incorporated under Clause 2.5.1 of the PSA. The associated cheques are filed herewith as Plaint Document No.5 (Colly). However, the Defendant subsequently vide letter dated 04.07.2016 ordered their bank to stop payment of their cheques. The communication is filed herewith as Plaint Document No.6."

Consequently, since the cheques have been issued by way of security and were not intended to be deposited, the institution of a complaint under Section 138 is an abuse of the process. Therefore, the invocation of the jurisdiction under Section 482 CrPC is justified;

(ii) Section 202 CrPC envisages the postponement of the issuance of process where the accused resides beyond the jurisdiction of the territory of the court. Despite the clear provisions of Section 202, no inquiry was carried out by the Magistrate; and

(iii) The summoning order shows non-application of mind inasmuch as no reasons have been adduced by the Magistrate.

In this backdrop, the following sequence of events was emphasized in the course of the submissions:

- 10 August 2016 : issuance of LC;
- 30 September 2016: complainant stopped the supply of power;
- 20 October 2016: termination of the PSA by the company;
- 30 June 2017: instructions issued to the bankers to stop payment;
- 31 August 2017: presentation of the cheques;
- 2 November 2017: complaint under Section 138 filed;
- 3 November 2017: affidavit filed in support of the complaint; and
- 6 November 2017: summoning order issued.

13. On the basis of the above sequence of events, it has been submitted that recourse to the filing of a complaint under Section 138 of NI Act is an abuse of the process. In the course of evaluating the submissions, the line of precedent to which a reference has been made would be considered.

14. Ms. Meenakshi Arora, learned senior counsel submitted that a clear case for the invocation of the jurisdiction under Section 482 CrPC was established for the following reasons:

(i) Though the contract was terminated on 20 October 2016 by the company, the cheques were presented to the bank only on 31 August 2017;

(ii) The fact that the cheques were issued towards security for payment is

evident from the endorsement on the reverse of the cheques and from the admission in paragraph 8 of the plaint instituted by the second respondent in the High Court of Madras;

(iii) Under the terms of the PSA, payment was envisaged to be made through LC and not by cheque;

(iv) A civil suit has been instituted by the second respondent for the recovery of its dues;

(v) MSEDCL has raised an additional charge which has been occasioned by the default of the second respondent; and

(vi) Apart from the bald statement that the Directors are in-charge of and responsible for the management of the company, no specific role has been ascribed to them in the plaint so as to invoke the doctrine of vicarious liability.

15. On the other hand, Mr. Mohit Mathur and Ms. Rebecca John, learned senior counsel appearing on behalf of the second respondent have submitted that:

(i) The High Court has noted in the impugned judgment that there is no dispute in regard to the liability of the company for electricity supplied during the months of August, September and October 2016;

(ii) Though the PSA envisaged that payment would be made through LC, they could not be honoured because the LC were not in a format acceptable to the Bankers of the second respondent;

(iii) The Law does not prohibit the invocation of Section 138 of the NI Act even in a situation where the cheques have been issued initially as a security;

(iv) The summoning order of the Magistrate conforms to law. The complaint was instituted on 2 November 2017 and was duly supported by an affidavit dated 3 November 2017. A summoning order is not required to furnish detailed reasons particularly in a case under Section 138 of the NI Act, having due regard to the summary nature of the proceedings; and

(v) The complaint spells out the role attributed to the Directors and *prima facie* at this stage, the test of vicarious liability is duly met.

On the above premises, it has been submitted that there is no reason for this Court, to interfere with the judgment of the High Court since detailed reasons have been furnished by the High Court for rejecting the petitions under Section 482 of the CrPC.

16. Ms. Aastha Mehta, learned counsel for the State of Gujarat has submitted that the trial has not proceeded since 2017 due to the pendency of the proceedings before the High Court and this Court. Learned counsel urged that there is no ground to interfere with the order of the High Court.

17. The issues which arise for our consideration are as follows:

(i) Whether the dishonor of a cheque furnished as a 'security' is covered under the provisions of Section 138 of the NI Act;

(ii) Whether the Magistrate, in view of Section 202 CrPC, ought to have postponed the issuance of process; and

(iii) Whether a *prima facie* case of vicarious liability is made out against the appellants.

18. The first submission which has been urged on behalf of the appellants is that a complaint under Section 138 of the NI Act would not be maintainable since the cheque of Rs 2.67 crores was issued by way of a security and, is thus not against a legally enforceable debt or liability. The appellant has placed reliance on the judgment of a two judge Bench of this Court in **Indus Airways Private Limited** v. **Magnum Aviation Private Limited**[9]. The issue in that case was whether the post-dated cheques which were issued by the appellants who were purchasers, as an advance payment in respect of purchase orders, could be considered to be in discharge of a legally enforceable debt or other liability and whether the dishonor of the cheques amounted to an offence under Section 138. The appellants had placed two purchase orders for the supply of aircraft parts with the first respondent and had issued two post-dated cheques as advance payment. The supplier received a letter from the purchasers cancelling the purchase and requesting the return of both the cheques. Following a notice by the suppliers, a complaint was instituted under Section 138 upon which cognizance was taken by the Magistrate and summons were issued. The High Court allowed a petition under Section 482 CrPC and set aside the order issuing process by construing the expression "discharge of any debt or other liability" in Section 138 holding that there must be a liability at the time of issuing the cheque[10]. In appeal, Justice R M Lodha writing for a two-Judge Bench allowed the appeal[11] observing:

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[9] (2014) 12 SCC 539

[10] **"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

> "9. The Explanation appended to Section 138 explains the meaning of the expression "debt or other liability" for the purpose of Section 138. This expression means a legally enforceable debt or other liability. Section 138 treats dishonoured cheque as an offence, if the cheque has been issued in discharge of any debt or other liability. The Explanation leaves no manner of doubt that to attract an offence under Section 138, there should be a legally enforceable debt or other liability subsisting on the date of drawal of the cheque. In other words, drawal of the cheque in discharge of an existing or past adjudicated liability is sine qua non for bringing an offence under Section 138. If a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either because of its cancellation or otherwise, and material or goods for which purchase order was placed is not supplied, in our considered view, the cheque cannot be held to have been drawn for an existing debt or liability. The payment by cheque in the nature of advance payment indicates that at the time of drawal of cheque, there was no existing liability."

19. Drawing the distinction between civil and criminal liability, it was observed that if there is a breach in the condition of advance payment, it would not incur criminal liability under Section 138 of the NI Act since there is no legally enforceable debt or liability at the time when the cheque was drawn. The Court held that if at the time when a contract is entered into, the purchaser has to pay

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cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for 8 [a term which may be extended to two years'], or with fine which may extend to twice the amount of the cheque, or with both:
Provided that nothing contained in this section shall apply unless—
(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;
(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice; in writing, to the drawer of the cheque, 9 [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and
(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.
Explanation.—For the purposes of this section, "debt of other liability" means a legally enforceable debt or other liability."

[11] It was held that the view taken by the Andhra Pradesh High Court in **Swastik Coaters** v. **Deepak Bros**, 1997 Cri LJ 1942 (AP), the Gujarat High Court in **Shanku Concreates** v. **State of Gujarat**, 2000 Cro LJ 1988 (Guj), the Madras High Court in **Balaji Seafoods Exports** v. **Mac Industries,** (1999) 1 CTC 6 (Mad).

an advance and there was a breach of that condition, the purchaser may have to make good the loss to the seller, but this would not occasion a criminal liability under Section 138. The issuance of a cheque towards advance payment at the time of the execution of the contract would not - in the view which has adopted in **Indus Airways -** be considered as a subsisting liability so as to attract an offence under Section 138 upon the dishonor of the cheque.

20. A later judgment of a two judge Bench in **Sampelly Satyanarayana Rao** v. **Indian Renewable Energy Development Agency Limited**[12] considered the decision in **Indus Airways**. In **Sampelly,** the appellant was the Director of a company which was engaged in power generation, while the respondent was a government enterprise engaged in renewable energy. The respondent agreed to advance a loan for setting up a power project and the agreement envisaged that post-dated cheques towards payment of installments of the loans would be given by way of security. The cheques having been dishonored, complaints were instituted under Section 138 which led to quashing petitions filed before the High Court. The submission which was urged before this Court was that dishonor of the post-dated cheques given by way of security did not amount to a legally enforceable debt or liability under Section 138 *in presentia*. This Court held, after adverting to the decision in **Indus Airways** that if on the date of the cheque, a liability or debt exists or the amount has become enforceable, Section 138 would stand attracted and not otherwise. The decision in **Indus Airways** was distinguished in **Sampelly** (supra) on the ground that in that case, the cheque

[12] (2016) 10 SCC 458

had not been issued for discharge of a liability but as advance for a purchase order which was cancelled. On the other hand, in **Sampelly,** the cheque was for the repayment of a loan installment which had fallen due. The Court noted that though the deposit of cheques towards the repayment of installments was described as a security in the loan agreement, the true test was whether the cheque was in discharge of an existing enforceable debt or liability or whether it was towards an advance payment without there being a subsisting debt or liability.

21. Besides the distinguishing features which were noticed in **Sampelly**, there was another ground which weighed in the judgment of this Court. The Court adverted to the decision in **HMT Watches** v. **MA Habida**[13] to hold that whether the cheques were given as security constitutes the defense of the accused and is a matter of trial. The extract from the decision in **HMT Watches** which is cited in the decision in **Indus Airways** is thus:

> "10. Whether the cheques were given as security or not, or whether there was outstanding liability or not is a question of fact which could have been determined only by the trial court after recording evidence of the parties. In our opinion, the High Court should not have expressed its view on the disputed questions of fact in a petition under Section 482 of the Code of Criminal Procedure, to come to a conclusion that the offence is not made out. The High Court has erred in law in going into the factual aspects of the matter which were not admitted between the parties.

22. In a more recent judgment of a two judge Bench in **Sripati Singh** v. **State of Jharkhand**[14], an order of the Magistrate taking cognizance and issuing

[13] (2015) 11 SCC 776
[14] 2021 SCC OnLine SC 1002

summons on a complaint under Section 420 IPC and Section 138 of the NI Act was challenged before the High Court. There was a transaction between the second respondent and the complainant pursuant to which the appellant had advanced sums of money. Several cheques were handed over but they were dishonored on presentation. The High Court allowed the petitions. An appeal was filed before this Court. Before this Court, the appellant urged that a cheque issued towards discharge of the loan and presented for recovery could not be construed as a security for the transaction. In appeal, this Court noted that there were four loan agreements under which the second respondent agreed to pay a total sum of Rs 2 crores and six cheques were issued as security. The High Court had held that since under the loan agreement the cheques were given by way of security, the complaint could not be maintained. Justice AS Bopanna, speaking for the two judge bench, adverted to the earlier decision in **Indus Airways** and the distinguishing features which were noticed in the decision in **Sampelly.** The Court held that where in the case of a loan transaction, the borrower agrees to repay the amount in a specified time frame and issues a cheque as a security to secure the repayment and the loan is not repaid, the cheque which is issued as security would mature for presentation. The Court observed:

> "17. A cheque issued as security pursuant to a financial transaction cannot be considered as a worthless piece of paper under every circumstance. 'Security' in its true sense is the state of being safe and the security given for a loan is something given as a pledge of payment. It is given, deposited or pledged to make certain the fulfilment of an obligation to which the parties to the transaction are bound. If in a transaction, a loan is advanced and the borrower agrees to repay the amount in a specified timeframe and issues a cheque as security to secure such repayment; if the loan amount is not repaid in any other form before the due date or if there is no other understanding or agreement between the

> parties to defer the payment of amount, the cheque which is issued as security would mature for presentation and the drawee of the cheque would be entitled to present the same. On such presentation, if the same is dishonoured, the consequences contemplated under Section 138 and the other provisions of N.I. Act would flow."

Moreover, as the Court explained:

> "18. When a cheque is issued and is treated as 'security' towards repayment of an amount with a time period being stipulated for repayment, all that it ensures is that such cheque which is issued as 'security' cannot be presented prior to the loan or the instalment maturing for repayment towards which such cheque is issued as security. Further, the borrower would have the option of repaying the loan amount or such financial liability in any other form and in that manner if the amount of loan due and payable has been discharged within the agreed period, the cheque issued as security cannot thereafter be presented. Therefore, the prior discharge of the loan or there being an altered situation due to which there would be understanding between the parties is a *sine qua non* to not present the cheque which was issued as security. These are only the defences that would be available to the drawer of the cheque in a proceedings initiated under Section 138 of the N.I. Act. Therefore, there cannot be a hard and fast rule that a cheque which is issued as security can never be presented by the drawee of the cheque. If such is the understanding a cheque would also be reduced to an 'on demand promissory note' and in all circumstances, it would only be a civil litigation to recover the amount, which is not the intention of the statute. When a cheque is issued even though as 'security' the consequence flowing therefrom is also known to the drawer of the cheque and in the circumstance stated above if the cheque is presented and dishonoured, the holder of the cheque/drawee would have the option of initiating the civil proceedings for recovery or the criminal proceedings for punishment in the fact situation, but in any event, it is not for the drawer of the cheque to dictate terms with regard to the nature of litigation."

The complaint, insofar as it invoked the provisions of Section 138 of the NI Act, was accordingly restored to the Judicial Magistrate to proceed in accordance with law.

23. In the present case, the PSA between the parties envisaged that the second respondent would supply power to the company of which the appellants are directors or as the case may be, managing director. The agreement

postulated that payment for the power supplied would be made by means of LCs. Though, the LCs' were provided, they were allegedly not in a form acceptable to the bankers of the second respondent. The appellants do not dispute that prior to the termination of the agreement, power was supplied for a period of three months to the company. In other words, the agreement for the supply of power was acted upon and power was supplied to by the second respondent and consumed by the company.

24. In **Sampelly** and **Sripati Singh**, post-dated cheques were issued as a security for loan installments that were due. On the dates on which the cheques were drawn, there was an outstanding debt. In the present case, the cheques were issued on 30 June 2016. The second respondent commenced the supply of electricity immediately from the next day that is from 1 July 2016. The facts of this case are in contrast with the facts in **Indus Airways.** In **Indus Airways**, since the purchase agreement was cancelled, there was no outstanding liability incurred before the encashment of the cheque. The transaction between the parties did not go through as a result of the cancellation of the purchase orders.

25. The explanation to Section 138 of the NI Act provides that 'debt or any other liability' means a legally enforceable debt or other liability. The proviso to Section 138 stipulates that the cheque must be presented to the bank within a period of six months from the date on which it is drawn or within its period of validity. Therefore, a cheque given as a gift and not for the satisfaction of a debt or other liability, would not attract the penal consequences of the provision in the event of its being returned for insufficiency of funds. Aiyar's Judicial Dictionary

defines debt as follows: “Debt is a pecuniary liability. A sum payable or recoverable by action in respect of money demand.” Lindey L.J in **Webb** v. **Strention**[15] defined debt as “… a sum of money which is now payable or will become payable in the future by reason of a present obligation, *debitum in praesenti, solvendum in futuro.*” The definition was adopted by this Court in **Keshoram Industries** v. **CWT**[16]. Justice Mookerjee writing for a Full Bench of the Calcutta High Court in **Banchharam Majumdar** v. **Adyanath Bhattacharjee**[17] adopted the definition provided by the Supreme Court of California in **People** v. **Arguello**[18]:

> “Standing alone, the word ‘debt’ is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. If we wish to distinguish between the two, we say of the former that it is a debt owing, and of the latter that it is a debt due. In other words, debts are of two kinds: *solvendum in praesenti* and *solvendum in future* … A sum of money which is certainly and in all events payable is a debt, without regard to the fact whether it be payable now or at a future time. A sum payable upon a contingency, however, is not a debt or does not become a debt until the contingency has happened.”

Thus, the term debt also includes a sum of money promised to be paid on a future day by reason of a present obligation. A post-dated cheque issued after the debt has been incurred would be covered by the definition of ‘debt’. However, if the sum payable depends on a contingent event, then it takes the color of a debt only *after* the contingency has occurred. Therefore, in the present case, a debt was incurred after the second respondent began supply of power for which payment was not made because of the non-acceptance of the LCs’. The issue to be determined is whether Section 138 only covers a situation where there is an

[15] 1888 QBD 518
[16] AIR 1966 SC 1370
[17] (1909) ILR 36 Cal 936
[18] 1869 37 Calif 524

outstanding debt at the time of the drawing of the cheque or includes drawing of a cheque for a debt that is incurred before the cheque is encashed.

26. The object of the NI Act is to enhance the acceptability of cheques and inculcate faith in the efficiency of negotiable instruments for transaction of business. The purpose of the provision would become otiose if the provision is interpreted to exclude cases where debt is incurred after the drawing of the cheque but before its encashment. In **Indus Airways**, advance payments were made but since the purchase agreement was cancelled, there was no occasion of incurring any debt. The true purpose of Section 138 would not be fulfilled, if 'debt or other liability' is interpreted to include only a debt that exists as on the date of drawing of the cheque. Moreover, Parliament has used the expression 'debt or other liability'. The expression "or other liability' must have a meaning of its own, the legislature having used two distinct phrases. The expression 'or other liability' has a content which is broader than 'a debt' and cannot be equated with the latter. In the present case, the cheque was issued in close proximity with the commencement of power supply. The issuance of the cheque in the context of a commercial transaction must be understood in the context of the business dealings. The issuance of the cheque was followed close on its heels by the supply of power. To hold that the cheque was not issued in the context of a liability which was being assumed by the company to pay for the dues towards power supplied would be to produce an outcome at odds with the business dealings. If the company were to fail to provide a satisfactory LC and yet consume power, the cheques were capable of being presented for the purpose of meeting the outstanding dues.

27. According to the complainant, the LCs' were not in a format agreed to by their bankers. The cheques which were initially towards security could not have been presented before the payments under the PSA fell due. Moreover, if the company were to discharge its liability to pay the outstanding dues under the power supply agreement through the agreed modality of an LC to the satisfaction of the second respondent's bankers, there would be no occasion to present the cheque thereafter. In other words, once payments for electricity supply became due in terms of the PSA, and the company failed to discharge its dues, the second respondent was entitled in law to present the cheque for payment. Merely labelling the cheque as a security would not obviate its character as an instrument designed to meet a legally enforceable debt or liability, once the supply of power had been provided for which there were monies due and payable. There is no inflexible rule which precludes the drawee of a cheque issued as security from presenting it for payment in terms of the contract. . It all depends on whether a legally enforceable debt or liability has arisen.

28. At this stage, it would be instructive to note the order of a two judge Bench of this Court in **M/s Womb Laboratories Pvt Ltd** v. **Vijay Ahuja**[19]. In that case, the High Court had quashed proceedings initiated against the first respondent for offences punishable under Section 138 of the NI Act merely on the basis of the assertion in the complaint that "security cheques were demanded" in response to which the accused had issued three signed blank cheques with the assurance that if the amount was not returned, the cheques could be encashed. The High

[19] Criminal Appeal Nos 1382-1383 of 2019, decided on 11 September 2019

Court held that the cheques were given only by way of security and therefore not towards the discharge of a debt or liability on the basis of which the complaint was quashed. Allowing the appeal by the drawee, this Court observed:

> "5. In our opinion, the High Court has muddled the entire issue. The averment in the complaint does indicate that the signed cheques were handed over by the accused to the complainant. The cheques were given by way of security, is a matter of defence. Further, it was not for the discharge of any debt or any liability is also a matter of defence. The relevant facts to countenance the defence will have to be proved - that such security could not be treated as debt or other liability of the accused. That would be a triable issue. We say so because, handing over of the cheques by way of security per se would not extricate the accused from the discharge of liability arising from such cheques."

29. The order of this Court in **Womb Laboratories** holds that the issue as to whether the cheques were given by way of security is a matter of defence. This line of reasoning in **Womb Laboratories** is on the same plane as the observations in **HMT Watches**, where it was held that whether a set of cheques has been given towards security or otherwise or whether there was an outstanding liability is a question of fact which has to be determined at the trial on the basis of evidence. The rationale for this is that a disputed question of this nature cannot be resolved in proceedings under Section 482 CrPC, absent evidence to be recorded at the trial.

30. The submission which has been urged on behalf of the appellants, however, is that the fact that the cheques in the present case have been issued as a security is not in dispute since it stands admitted from the pleading of the second respondent in the suit instituted before the High Court of Madras. The legal requirement which Section 138 embodies is that a cheque must be drawn

by a person for the payment of money to another “for the discharge, in whole or in part, of any debt or other liability’. A cheque may be issued to facilitate a commercial transaction between the parties. Where, acting upon the underlying purpose, a commercial arrangement between the parties has fructified, as in the present case by the supply of electricity under a PSA, the presentation of the cheque upon the failure of the buyer to pay is a consequence which would be within the contemplation of the drawer. The cheque, in other words, would in such an instance mature for presentation and, in substance and in effect, is towards a legally enforceable debt or liability. This precisely is the situation in the present case which would negate the submissions of the appellants.

31. The second submission which has been urged on behalf of the appellants turns upon Section 202 CrPC, which is extracted:

> “202. Postponement of issue of process.—(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, 1 [and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction,] postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:
>
> Provided that no such direction for investigation shall be made,— (a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or (b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.
>
> (2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath: Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call

> upon the complainant to produce all his witnesses and examine them on oath.
>
> (3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant."

32. Under Sub-Section (1) of Section 202, a Magistrate upon the receipt of a complaint of an offence of which he/she is authorized to take cognizance is empowered to postpone the issuance of process against the accused and either (i) enquire into the case; or (ii) direct an investigation to be made by a police officer or by such other person as he thinks fit. The purpose of postponing the issuance of process for the purposes of an enquiry or an investigation is to determine whether or not there is sufficient ground for proceeding. However, it is mandatory for the Magistrate to do so in a case where the accused is residing at a place beyond the area in which the Magistrate exercises jurisdiction. The accused persons in the present case reside at Aurangabad while the complaint under Section 138 was filed before the Magistrate in Mundra. The argument of the appellants is that in these circumstances, the Magistrate was duty bound to postpone the issuance of process and to either enquire into the case himself or to direct an investigation either by a police officer or by some other person. Section 203 stipulates that if the Magistrate is of the opinion on considering the statement on oath, if any, of the complainant and of the witnesses, and the result of the enquiry or investigation if any under Section 202 that there is no sufficient ground for proceeding, he shall dismiss the complaint recording briefly his reasons for doing so. The requirement of recording reasons which is specifically incorporated in Section 203 does not find place in Section 202. Section 204 which deals with

the issuance of process stipulates that if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, he may issue (a) in a summons case, a summons for attendance of the accused; (b) in a warrant case, a warrant or if he thinks fit a summons for the appearance of the accused. These proceedings have been interpreted in several judgments of this Court. For the purpose of the present case, some of them form the subject matter of the submissions by the appellants and the second respondent.

33. The provisions of Section 202 which mandate the Magistrate, in a case where the accused is residing at a place beyond the area of its jurisdiction, to postpone the issuance of process so as to enquire into the case himself or direct an investigation by police officer or by another person were introduced by Act 25 of 2005 with effect from 23 June 2006. The rationale for the amendment is based on the recognition by Parliament that false complaints are filed against persons residing at far off places as an instrument of harassment. In **Vijay Dhanuka** v. **Najima Mamtaj**[20], this Court dwelt on the purpose of the amendment to Section 202, observing:

> "11. Section 202 of the Code, inter alia, contemplates postponement of the issue of the process 'in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction' and thereafter to either inquire into the case by himself or direct an investigation to be made by a police officer or by such other person as he thinks fit. In the face of it, what needs our determination is as to whether in a case where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, inquiry is mandatory or not.
>
> 12. The words 'and shall, in a case where the accused is residing at a place beyond the area in which he exercises his

[20] (2014) 14 SCC 638

> jurisdiction' were inserted by Section 19 of the Code of Criminal Procedure (Amendment) Act (Central Act 25 of 2005) w.e.f. 23-6-2006. The aforesaid amendment, in the opinion of the legislature, was essential as false complaints are filed against persons residing at far-off places in order to harass them. The note for the amendment reads as follows:
>
> 'False complaints are filed against persons residing at far-off places simply to harass them. In order to see that innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section (1) of Section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused.'
>
> The use of the expression "shall" prima facie makes the inquiry or the investigation, as the case may be, by the Magistrate mandatory. The word "shall" is ordinarily mandatory but sometimes, taking into account the context or the intention, it can be held to be directory. The use of the word "shall" in all circumstances is not decisive. Bearing in mind the aforesaid principle, when we look to the intention of the legislature, we find that it is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints. Hence, in our opinion, the use of the expression "shall" and the background and the purpose for which the amendment has been brought, we have no doubt in our mind that inquiry or the investigation, as the case may be, is mandatory before summons are issued against the accused living beyond the territorial jurisdiction of the Magistrate."

34. This Court has held that the Magistrate is duty bound to apply his mind to the allegations in the complaint together with the statements which are recorded in the enquiry while determining whether there is a *prima facie* sufficient ground for proceeding. In **Mehmood Ul Rehman** v. **Khazir Mohammad Tunda**[21], this Court followed the dictum in **Pepsi Foods Ltd.** v. **Special Judicial Magistrate**[22],

[21] (2015) 12 SCC 420
[22] (1998) 5 SCC 749

and observed that setting the criminal law in motion against a person is a serious matter. Hence, there must be an application of mind by the Magistrate to whether the allegations in the complaint together with the statements recorded or the enquiry conducted constitute a violation of law. The Court observed:

> "20. The extensive reference to the case law would clearly show that cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the allegations in the complaint, when considered along with the statements recorded or the inquiry conducted thereon, would constitute violation of law so as to call a person to appear before the criminal court. It is not a mechanical process or matter of course. As held by this Court in Pepsi Foods Ltd. v. Judicial Magistrate [Pepsi Foods Ltd. v. Judicial Magistrate, (1998) 5 SCC 749 : 1998 SCC (Cri) 1400] to set in motion the process of criminal law against a person is a serious matter."
>
> ***
>
> "22. The steps taken by the Magistrate under Section 190(1)(a) CrPC followed by Section 204 CrPC should reflect that the Magistrate has applied his mind to the facts and the statements and he is satisfied that there is ground for proceeding further in the matter by asking the person against whom the violation of law is alleged, to appear before the court. The satisfaction on the ground for proceeding would mean that the facts alleged in the complaint would constitute an offence, and when considered along with the statements recorded, would, prima facie, make the accused answerable before the court. No doubt, no formal order or a speaking order is required to be passed at that stage. The Code of Criminal Procedure requires speaking order to be passed under Section 203 CrPC when the complaint is dismissed and that too the reasons need to be stated only briefly. In other words, the Magistrate is not to act as a post office in taking cognizance of each and every complaint filed before him and issue process as a matter of course. There must be sufficient indication in the order passed by the Magistrate that he is satisfied that the allegations in the complaint constitute an offence and when considered along with the statements recorded and the result of inquiry or report of investigation under Section 202 CrPC, if any, the accused is answerable before the criminal court, there is ground for proceeding against the accused under Section 204 CrPC, by issuing process for appearance. The application of mind is best

> demonstrated by disclosure of mind on the satisfaction. If there is no such indication in a case where the Magistrate proceeds under Sections 190/204 CrPC, the High Court under Section 482 CrPC is bound to invoke its inherent power in order to prevent abuse of the power of the criminal court. To be called to appear before the criminal court as an accused is serious matter affecting one's dignity, self-respect and image in society. Hence, the process of criminal court shall not be made a weapon of harassment."

These decisions were cited with approval in **Abhijit Pawar** v. **Hemant Madhukar Nimbalkar**[23]. After referring to the purpose underlying the amendment of Section 202, the Court observed:

> "25. … the amended provision casts an obligation on the Magistrate to apply his mind carefully and satisfy himself that the allegations in the complaint, when considered along with the statements recorded or the enquiry conducted thereon, would prima facie constitute the offence for which the complaint is filed. This requirement is emphasised by this Court in a recent judgment *Mehmood Ul Rehman* v. *Khazir Mohammad Tunda* [*Mehmood Ul Rehman* v. *Khazir Mohammad Tunda*, (2015) 12 SCC 420 : (2016) 1 SCC (Cri) 124]…"

35. While noting that the requirement of conducting an enquiry or directing an investigation before issuing process is not an empty formality, the Court relied on the decision in **Vijay Dhanuka** which had held that the exercise by the Magistrate for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused is nothing but an enquiry envisaged under Section 202 of the Code.

[23] (2017) 3 SCC 528

36. In **Birla Corporation Ltd.** v. **Adventz Investments and Holdings**[24], the earlier decisions which have been referred to above were cited in the course of the judgment. The Court noted:

> "26. The scope of enquiry under this section is extremely restricted only to finding out the truth or otherwise of the allegations made in the complaint in order to determine whether process should be issued or not under Section 204 CrPC or whether the complaint should be dismissed by resorting to Section 203 CrPC on the footing that there is no sufficient ground for proceeding on the basis of the statements of the complainant and of his witnesses, if any. At the stage of enquiry under Section 202 CrPC, the Magistrate is only concerned with the allegations made in the complaint or the evidence in support of the averments in the complaint to satisfy himself that there is sufficient ground for proceeding against the accused."

Hence, the Court held:

> "33. 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. The application of mind has to be indicated by disclosure of mind on the satisfaction. Considering the duties on the part of the Magistrate for issuance of summons to the accused in a complaint case and that there must be sufficient indication as to the application of mind and observing that the Magistrate is not to act as a post office in taking cognizance of the complaint, in *Mehmood Ul Rehman* [*Mehmood Ul Rehman* v. *Khazir Mohammad Tunda*, (2015) 12 SCC 420 : (2016) 1 SCC (Cri) 124]…"

The above principles have been reiterated in the judgment in **Krishna Lal Chawla** v. **State of U.P**[25].

[24] (2019) 16 SCC 610
[25] (2021) 5 SCC 435.

37. In this backdrop, it becomes necessary now to advert to an order dated 16 April 2021 of a Constitution Bench in **Re: Expeditious Trial of Cases under Section 138 of N.I. Act 1881**[26]. The Constitution Bench notes "the gargantuan pendency of complaints filed under Section 138" and the fact that the "situation has not improved as courts continue to struggle with the humongous pendency". The court noted that there were seven major issues which arose from the responses filed by the State Governments and the Union Territories including in relation to the applicability of Section 202 of the CrPC. Section 143 of the NI Act provides that Sections 262 to 265 of the CrPC (forming a part of Chapter XXI dealing with summary trials) shall apply to all trials for offences punishable under Section 138 of the NI Act. On the scope of the inquiry under Section 202 CrPC in cases under Section 138 of the NI Act, there was a divergence of view between the High Courts. Some High Courts had held that it was mandatory for the Magistrate to conduct an inquiry under Section 202 CrPC before issuing process in complaints filed under Section 138, while there were contrary views in the other High Courts. In that context, the Court observed:

> "10. Section 202 of the Code confers jurisdiction on the Magistrate to conduct an inquiry for the purpose of deciding whether sufficient grounds justifying the issue of process are made out. The amendment to Section 202 of the Code with effect from 23.06.2006, vide Act 25 of 2005, made it mandatory for the Magistrate to conduct an inquiry before issue of process, in a case where the accused resides beyond the area of jurisdiction of the court. (See: Vijay Dhanuka & Ors. v. Najima Mamtaj & Ors. 1 , Abhijit Pawar v. Hemant Madhukar Nimbalkar and Anr. and Birla Corporation Limited v. Adventz Investments and Holdings Limited & Ors.). There has been a divergence of opinion amongst the High Courts relating to the applicability of Section 202 in respect of complaints filed under Section 138 of the Act. Certain cases

[26] Suo Motu Writ Petition (Crl) No. 2 of 2020, decided on 16 April 2021

> under Section 138 have been decided by the High Courts upholding the view that it is mandatory for the Magistrate to conduct an inquiry, as provided in Section 202 of the Code, before issuance of process in complaints filed under Section 138. Contrary views have been expressed in some other cases. It has been held that merely because the accused is residing outside the jurisdiction of the court, it is not necessary for the Magistrate to postpone the issuance of process in each and every case. Further, it has also been held that not conducting inquiry under Section 202 of the Code would not vitiate the issuance of process, if requisite satisfaction can be obtained from materials available on record.
>
> 11. The learned Amici Curiae referred to a judgment of this Court in K.S. Joseph v. Philips Carbon Black Ltd & Anr. where there was a discussion about the requirement of inquiry under Section 202 of the Code in relation to complaints filed under Section 138 but the question of law was left open. In view of the judgments of this Court in Vijay Dhanuka (supra), Abhijit Pawar (supra) and Birla Corporation (supra), the inquiry to be held by the Magistrate before issuance of summons to the accused residing outside the jurisdiction of the court cannot be dispensed with. The learned Amici Curiae recommended that the Magistrate should come to a conclusion after holding an inquiry that there are sufficient grounds to proceed against the accused. We are in agreement with the learned Amici."

38. Section 145 of the NI Act provides that evidence of the complainant may be given by him on affidavit, which shall be read in evidence in an inquiry, trial or other proceeding notwithstanding anything contained in the CrPC. The Constitution Bench held that Section 145 has been inserted in the Act, with effect from 2003 with the laudable object of speeding up trials in complaints filed under Section 138. Hence, the Court noted that if the evidence of the complainant may be given by him on affidavit, there is no reason for insisting on the evidence of the witnesses to be taken on oath. Consequently, it was held that Section 202(2) CrPC is inapplicable to complaints under Section 138 in respect of the examination of witnesses on oath. The Court held that the evidence of witnesses

on behalf of the complainant shall be permitted on affidavit. If the Magistrate holds an inquiry himself, it is not compulsory that he should examine witnesses and in suitable cases the Magistrate can examine documents to be satisfied that there are sufficient grounds for proceeding under Section 202.

39. In the present case, the Magistrate has adverted to:

(i) The complaint;

(ii) The affidavit filed by the complainant;

(iii) The evidence as per evidence list and; and

(iv) The submissions of the complainant.

40. The order passed by the Magistrate cannot be held to be invalid as betraying a non-application of mind. In **Dy. Chief Controller of Imports & Exports** v. **Roshanlal Agarwal**[27]**,** this Court has held that in determining the question as to whether process is to be issued, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can only be determined at the trial.

[See also in this context the decision in **Bhushan Kumar** v. **State (NCT of Delhi**)[28]].

41. The High Court did not quash the complaint against the appellants since it was *prima facie* established that they were triable for dishonour of cheque. Section 141 of the NI Act provides:

[27] (2003) 4 SCC 139
[28] (2012) 5 SCC 424

> 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 anybody corporate and includes a firm or other association of individuals; and (b) "director", in relation to a firm, means a partner in the firm."

42. Section 141 of the NI Act stipulates that if a company is alleged to have committed an offence under Section 138, then every person who 'was in charge of, and responsible to, the company for the conduct of the business of the company' shall also be deemed guilty of the offence. The proviso provides an exception if she proves that the offence was committed without her knowledge or that she had exercised due diligence. In **Sunil Bharati Mittal** v. **CBI**[29], a three

[29] (2015) 4 SCC 609

judge Bench of this Court observed that the general rule is that criminal intent of a group of people who undertake business can be imputed to the Company but not the other way around. Only two exceptions were provided to this general rule: (i) when the individual has perpetuated the commission of offence and there is sufficient evidence on the active role of the individual; and (ii) the statute expressly incorporates the principle of vicarious liability. Justice Sikri writing for a three-judge Bench observed:

> "43. Thus, an individual who has perpetrated the commission of an offence on behalf of a company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Second situation in which he can be implicated is in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.
> 44. When the company is the offender, vicarious liability of the Directors cannot be imputed automatically, in the absence of any statutory provision to this effect. One such example is Section 141 of the Negotiable Instruments Act, 1881. In *Aneeta Hada* [*Aneeta Hada* v. *Godfather Travels & Tours (P) Ltd.*, (2012) 5 SCC 661 : (2012) 3 SCC (Civ) 350 : (2012) 3 SCC (Cri) 241] , the Court noted that if a group of persons that guide the business of the company have the criminal intent, that would be imputed to the body corporate and it is in this backdrop, Section 141 of the Negotiable Instruments Act has to be understood. Such a position is, therefore, because of statutory intendment making it a deeming fiction. Here also, the principle of "alter ego", was applied only in one direction, namely, where a group of persons that guide the business had criminal intent, that is to be imputed to the body corporate and not the vice versa. Otherwise, there has to be a specific act attributed to the Director or any other person allegedly in control and management of the company, to the effect that such a person was responsible for the acts committed by or on behalf of the company."

43. In **SMS Pharmaceuticals** v. **Neeta Bhalla**[30], a three judge Bench while construing the provisions of Section 141 of the Negotiable Instruments Act 1881, has noted that the position of a Managing Director or a Joint Managing Director of a company is distinct since persons occupying that position are in charge of and responsible for the conduct of the business. It was observed that though there is a general presumption that the Managing Director and Joint Managing Director are responsible for the criminal act of the company, the director will not be held liable if he was not responsible for the conduct of the company at the time of the commission of the offence. The Court observed:

> "9. The position of a managing director or a joint managing director in a company may be different. These persons, as the designation of their office suggests, are in charge of a company and are responsible for the conduct of the business of the company. In order to escape liability such persons may have to bring their case within the proviso to Section 141(1), that is, they will have to prove that when the offence was committed they had no knowledge of the offence or that they exercised all due diligence to prevent the commission of the offence.
>
> […]
>
> Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for the conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. **The liability arises from being in charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company.** Conversely, a person not holding any office or designation in a company may be liable if he satisfies the main

[30] (2005) 8 SCC 89

> requirement of being in charge of and responsible for the conduct of business of a company at the relevant time."
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> **(emphasis supplied)**

The same principle has been followed by a Bench of two judges in **Mainuddin Abdul Sattar Shaikh** v. **Vijay D Salvi**[31] :

> "12. The respondent has adduced the argument that in the complaint the appellant has not taken the averment that the accused was the person in charge of and responsible for the affairs of the Company. However, as the respondent was the Managing Director of M/s Salvi Infrastructure (P) Ltd. and sole proprietor of M/s Salvi Builders and Developers, there is no need of specific averment on the point. This Court has held in *National Small Industries Corpn. Ltd.* v. *Harmeet Singh Paintal* [(2010) 3 SCC 330 : (2010) 1 SCC (Civ) 677 : (2010) 2 SCC (Cri) 1113] , as follows : (SCC p. 346, para 39)
>
> "*39*. (*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."

44. The test to determine if the Managing Director or a Director must be charged for the offence committed by the Company is to determine if the conditions in Section 141 of the NI Act have been fulfilled i.e., whether the individual was in-charge of and responsible for the affairs of the company during the commission of the offence. However, the determination of whether the conditions stipulated in Section 141 of the MMDR Act have been fulfilled is a matter of trial. There are sufficient averments in the complaint to raise a *prima facie* case against them. It is only at the trial that they could take recourse to the proviso to Section 141 and not at the stage of issuance of process.

[31] (2015) 9 SCC 622

45. In the present case, it is evident that the principal grounds of challenge which have been set up on behalf of the appellants are all matters of defence at the trial. The Magistrate having exercised his discretion, it was not open to the High Court to substitute its discretion. The High Court has in a carefully considered judgment, analysed the submissions of the appellants and for justifiable reasons has come to the conclusion that they are lacking in substance.

46. For the above reasons, we have come to the conclusion that there is no merit in the appeals. The appeals shall stand dismissed.

47. Pending applications, if any, are disposed of.

…….....J.
[Dr Dhananjaya Y Chandrachud]

…….....J.
[A S Bopanna]

New Delhi;
December 03, 2021.