CASE NO.:
Appeal (crl.) 850 of 2004

PETITIONER:
Monaben Ketanbhai Shah & Anr.

RESPONDENT:
State of Gujarat & Ors.

DATE OF JUDGMENT: 10/08/2004

BENCH:
Y.K. Sabharwal & D.M. Dharmadhikari.

JUDGMENT:
J U D G M E N T

(Arising out of SLP (Crl.) No.1269 of 2004)

Y.K. Sabharwal, J.

Leave granted.

The second respondent has filed a complaint against five accused under Section 138 of the Negotiable Instruments Act, 1881 (for short, "the Act") alleging dishonour of a cheque, the accused having stopped payment thereof. Out of five, three accused are ladies. On an application filed by the said accused, inter alia, alleging that the complaint does not fulfill the ingredients of Section 141 of the Act, the Magistrate directed their discharge holding that there are no allegations in the complaint, making out an offence against them. The order of the Magistrate was, however, set aside by the Sessions Judge. The learned Sessions Judge held that 'no doubt, it is not specifically mentioned in the complaint that all the accused were in-charge of the business but merely non-mentioning of specific words does not mean that they were not in-charge of the business' and in this view came to the conclusion that it was for the accused to establish that they had no knowledge about the transaction or had exercised due diligence. The High Court, by the impugned judgment, has upheld the order of the Sessions Judge insofar as it concerns the appellants. The order of the Sessions Judge insofar as original accused No.5 is concerned, has been reversed by the High Court and that of the Magistrate restored since the High Court came to the conclusion that accused No.5 was a student up to 1998 studying at Ahmedabad, and thereafter she got married and went to USA and in these circumstances her case stood on different footing. The remaining two sisters are in appeal on grant of special leave.

Section 138 of the Act makes dishonour of the cheque an offence punishable with imprisonment or fine or both. Section 141 relates to offences by the company. It provides that if the person committing an offence under Section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Thus, vicarious liability has been fastened on those who are in-charge of and responsible to the company for the conduct of its business. For the purpose of Section 141, a firm comes within the ambit of a company.

It is not necessary to reproduce the language of Section 141 verbatim in the complaint since the complaint is required to be read as a whole. If the substance of the allegations made in the complaint fulfill the requirements of Section 141, the complaint has to proceed and is required to be tried with. It is also true that in construing a complaint a hyper-technical approach should not be adopted so as to quash the same. The laudable object of preventing bouncing of cheques and sustaining the credibility of commercial transactions resulting in enactment of Sections 138 and 141 has to be borne in mind. These provisions create a statutory presumption of dishonesty exposing a person to criminal liability if payment is not

made within statutory period even after issue of notice. It is also true that the power of quashing is required to be exercised very sparingly and where, read as a whole, factual foundation for the offence has been laid in the complaint, it should not be quashed. All the same, it is also to be remembered that it is the duty of the Court to discharge the accused if taking everything stated in the complaint as correct and construing the allegations made therein liberally in favour of the complainant, the ingredients of the offence are altogether lacking. The present case falls in this category as would be evident from the facts noticed hereinafter.

The High Court in the impugned judgment has held that "on its perusal, it is clear that the respondent No.2 \026 original complainant has made specific allegations against the accused persons including the present petitioners in the complaint that the petitioners are partners of the partnership firm and the petitioners have taken active interest in the business". The aforesaid finding is not supported by the complaint. There are no averments in the complaint that the appellants have taken active interest in the business. There are two material paragraphs in the complaint and rest of the complaint sets out the names of the witnesses to be examined by the complainant besides the prayer clause. The two paragraphs read as under :

"(1) The accused in this matter, for the development of their business had taken amount of Rs.60,000/- through Agent on 8.1.1998 which was paid by us vide cheque No.7432109 drawn on Canara Bank for Rs.60,000/- which are received by the accused, therefore, the receipt was also issued on 8.1.1998.

(2) The said amount was for 2.5 months. Therefore, the accused had issued us a cheque No.3358762 dated 23.3.1998 drawn on State Bank of Saurashtra, Kalanala Branch, Bhavnagar for a sum of Rs.62,250/-. On presentation of the said cheque in our account the accused had stopped payment on the said cheque so it was returned. The Canara Bank was given intimation in this regard by letter dated 17.9.1998 S.B.S. Kalanala, Bhavnagar. And, therefore, on 19.9.1998 the Canara Bank informed us, so the notice through Advocate dated 28.9.1998 was issued to the accused. And although all of them are served but no amount is paid."

The material part of the title of the complaint reads thus :

"Karta of Himanshu Jayantilal,
H.U.F.
Himmanshu Jayantilal Thakkar .\005\005\005.
\005Complainant

Versus
Partners of Sona Fibres
(1) Shah Madhumati Harshadraj
(2) Harshadrai V. Shah (H.U.F.)
(3) Monaben Ketanbhai Shah
(4) Sonaben R. Shah
(5) Rupaben Harshabhai Shah
\005\005\005 \005\005\005 \005\005.
\005 Accused"

From the above, it is evident that in the complaint there are no averments against the appellants except stating in the title that they are partners of the firm. Learned counsel for the respondents/complainant contended that a copy of the partnership deed was also filed which would show that the appellants were active in the business. No such document was filed with the complaint or made part thereof. The filing of the partnership deed later is of no consequence for

determining the point in issue. Section 141 does not make all partners liable for the offence. The criminal liability has been fastened on those who, at the time of the commission of the offence, was in charge of and was responsible to the firm for the conduct of the business of the firm. These may be sleeping partners who are not required to take any part in the business of the firm; they may be ladies and others who may not know anything about the business of the firm. The primary responsibility is on the complainant to make necessary averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every partner knows about the transaction. The obligation of the appellants to prove that at the time the offence was committed they were not in charge of and were not responsible to the firm for the conduct of the business of the firm, would arise only when first the complainant makes necessary averments in the complaint and establishes that fact. The present case is of total absence of requisite averments in the complaint.

In K.P.G. Nair v. Jindal Menthol India Ltd. [(2001) 10 SCC 218], this Court held that the substance of allegations read as a whole should answer and fulfill the requirements of the ingredients of Section 141. The criminal complaint was quashed in Katta Sujatha (Smt.) v. Fertilizers & Chemicals Travancore Ltd. & Anr. [(2002) 7 SCC 655], since in the complaint it was not stated that the accused was in charge of the business and was responsible for the conduct of the business of the firm nor was their any other allegation that she had connived with any other partner in the matter of issue of cheque.

Under the aforesaid circumstances, we set aside the impugned judgment of the High Court and restore the order of the Magistrate discharging the appellants. The appeal is allowed accordingly.

JUDIS