

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

CRL.M.C. 1410/2018

Reserved on : 26.02.2020

Date of Decision : 03.03.2020

IN THE MATTER OF:

SUNITA PALTA & ORS Petitioners
Through: Mr. Saraswata Mohapatra, Advocate

Versus

M/S KIT MARKETING PVT LTD Respondent
Through: Mr. Rajiv Sharma, Advocate

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

1. The present proceedings are instituted under Section 482 Cr.P.C challenging the order dated 14.02.2017 passed by the Metropolitan Magistrate in CC No.874/2017 whereby the present petitioners were summoned for the offence punishable under Section 138 N.I. Act.

2. The respondent, a private limited company, had filed a complaint through its authorized representative stating that it was engaged in the business of plywood in the name and style of M/s Kit Marketing Private Limited. The accused are regular purchasers of goods from the complainant on credit basis and have made regular payment towards sale consideration from time to time in the past. On 01.12.2016, there was an outstanding balance of Rs.36,46,758/- payable by the accused against which following four account payee cheques were issued:

<i>Cheque Nos</i>	<i>Dated</i>	<i>Amount in Rs</i>
489872	02.09.2016	95,718/-

489853	09.09.2016	7,62,548/-
489897	19.09.2016	3,31,740/-
640194	07.11.2016	1,55,142/-

3. All the aforesaid cheques were drawn on State Bank of India, Nehru Place, New Delhi from the account maintained by accused company. The cheques were presented by the complainant in his bank namely Axis Bank Limited, Mundka Delhi within the period of limitation however the same were returned unpaid to the complainant vide bank's return memo dated 21.11.2016 and 13.12.2016 with the remarks "Funds Insufficient".

4. The complainant issued a legal notice of demand dated 19.12.2016, through speed post, calling upon the accused to make payment within 15 days from the date of its receipt. The notices were duly received by the accused persons on 20.12.2016. Since no payment was made within the statutory period of 15 days, a complaint under Section 138 read with Sections 141/142 of NI Act was filed on 30.01.2017. The complaint has been filed against the accused company along with 7 other accused persons including the present petitioners.

5. Learned counsel for the petitioners contended that the petitioners are the independent Non-executive Additional Directors and were never involved in the day to day affairs of the company at any point of time. In this regard, he has referred to the complaint where the present petitioners were wrongly described as Directors. He also referred to para 17 of the complaint which contained allegations against the present petitioners and the same is reproduced hereunder:

“17. That the accused no. 1 is liable because the cheques in question have issued on behalf of the accused no. 1 and the accused no.2 to 6 are liable being the managing directors and directors of the accused no.1 and also being responsible for the control and management and day to day affairs of the accused no.1 and the accused no. 7 and 8 are liable being the signatories of the cheques in question.”

6. The present petitioners were impleaded as accused nos. 5, 6 & 3. Learned counsel for the petitioners urged that it is an admitted case of the respondent that the petitioners were neither the Managing Directors nor the signatories to the cheques in question. Learned counsel for the petitioners also relied on the Form 32 with respect to Sunita Palta (petitioner No.1) and Bhagwan Singh Duggal (petitioner no.2) submitted on 29.06.2013 and 13.07.2013 respectively, showing them as independent Non-executive Additional Directors. Similarly, Form No. DIR-12 with respect to Ashwini Kumar Singh (petitioner No.3) shows his status as independent Non-executive Director w.e.f. 01.04.2014.

7. Learned counsel for the petitioners has also referred to the Annual Report for the year 2016-17 of the accused company and the certificate issued by the Company Secretary of the accused company which also shows the status of petitioners as independent Directors.

8. On the other hand, learned counsel for the respondent has supported the impugned order. It was submitted that the petitioners have the remedy to appear and place their defence before the trial court. He, however, has not disputed the position with respect to Form 32/Form No. DRI-12 filed by the petitioners. He submitted that the petitioners were named as Directors in the complaint on the basis of the information which was downloaded from the official website of ROC.

9. I have heard learned counsels for the parties and have also gone through the case records.

10. The vicarious liability of a person arises in terms of Section 141 of the Negotiable Instrument Act. In S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla reported as (2005) 8 SCC 89, it was held as follows:-

“10. While analysing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is committed by a company. The key words which occur in the section are ‘every person’. These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words:

‘Who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence, etc’

What is required is that the persons who are sought to be made criminally liable under Section 141 should be, at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for the conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a company may be liable if he satisfies the main requirement of being in charge of and responsible for the conduct of business of a

company at the relevant time. Liability depends on the role one plays in the affairs of a company and not on designation or status. If being a director or manager or secretary was enough to cast criminal liability, the Section would have said so. Instead of 'every person' the section would have said 'every director, manager or secretary in a company is liable'..., etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action.

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18. To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That the respondent falls within the parameters of Section 141 has to be spelt out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141, he would issue the process. We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non-director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial."

11. Again in, K.K. Ahuja v. V.K. Vora reported as (2009) 10 SCC 48, the vicarious liability of the officers of the company was summarised as under:-

“27. The position under Section 141 of the Negotiable Instruments Act, 1881 can be summarized thus:

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

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

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

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

12. The issue relating to vicarious liability of a Non-executive Director came up before the Supreme Court in Pooja Ravinder Devidasani v. State of Maharashtra and Anr. reported as **2014(14) SCALE**, and it was held as under:-

“17...Non-executive Director is no doubt a custodian of the governance of the Company but does not involve in the day-to-day affairs of the running of its business and only monitors the executive activity. To fasten vicarious liability under Section 141 of the Act on a person, at the material time that person shall have been at the helm of affairs of the Company, one who actively looks after the day-to-day activities of the Company and particularly responsible for the conduct of its business. Simply because a person is a Director of a Company, does not make him liable under the N.I. Act. Every person connected with the Company will not fall into the ambit of the provision. Time and again, it has been asserted by this Court that only those persons who were in charge of and responsible for the conduct of the business of the Company at the time of commission of an offence will be liable for criminal action. A Director, 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 for an offence under Section 141 of the N.I. Act. In National Small Industries Corporation (supra) this Court observed:

"13. Section 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without

anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent 1 was in charge of or was responsible to the accused Company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability.

14. A company may have a number of Directors and to make any or all the Directors as accused in a complaint merely on the basis of a statement that they are in charge of and responsible for the conduct of the business of the company without anything more is not a sufficient or adequate fulfillment of the requirements under Section 141.”

18. In Girdhari Lal Gupta Vs. D.H. Mehta & Anr. (1971) 3 SCC 189, this Court observed that a person 'in charge of a business' means that the person should be in overall control of the day to day business of the Company.

19. A Director of a Company is liable to be convicted for an offence committed by the Company if he/she was in charge of and was responsible to the Company for the conduct of its business or if it is proved that the offence was committed with the consent or connivance of, or was attributable to any negligence on the part of the Director concerned (See: State of Karnataka Vs. Pratap Chand & Ors).

*20. In other words, the law laid down by this Court is that for making a Director of a Company liable for the offences committed by the Company under Section 141 of the N.I. Act, **there must be specific averments against the Director showing as to how and in what manner the Director was responsible for the conduct of the business of the Company.”***

13. In Nandakumar & Ors. v. M/s ECE Industries Ltd. in SLP (Crl.) No.2770/2013 decided on 04.08.2014, while setting aside the order of dismissal of the petition of the accused filed under Section 482 Cr.P.C. by the High Court, the Supreme Court held as under:-

“Therefore, it is clear that merely being a Director of a company is not sufficient to make the person liable under Section 141 of the Act, till it is shown that the said Director was in-charge of and responsible for the conduct of his business.

The Court below and the High Court erred in not appreciating the fact that the complainant in the mechanical way cited the names of the appellants which alleged to have been obtained from the website of the Ministry of Corporate Affairs and unnecessary dragged the appellants in litigation who were not directly charged or responsible for the company for the conduct of business. The requirement of Section 141 of the Negotiable Instrument Act is against the persons responsible for the conduct or business of the company at the relevant time. In absence of such allegation against the appellants, we hold that the complainant misused the mandate of Section 138 of the Negotiable Instrument Act.”

14. Recently, in Chintalapati Srinivasa Raju v. Securities and Exchange Board of India reported as **(2018) 7 SCC 443**, it has been held as follows:-

“23....Non-Executive Directors are, therefore, persons who are not involved in the day-to-day affairs of the running of the company and are not in charge of and not responsible for the conduct of the business of the company.”

15. To the similar effect are the decisions of Coordinate Benches of this Court in Kanarath Payattiyath Balrajh v. Raja Arora reported as **2017 SCC Online 7418**, Har Sarup Bhasin v. M/s Origo Commodities India Pvt. Ltd. reported as **2020 SCC Online Del 9** and Chanakya Bhupen Chakravarti & Anr. v. Rajeshri Karwa & Ors. reported as **2018 SCC Online Del 12968**.

16. Sub-sections (6) and (12) of Section 149 of the Companies Act, 2013 defines an “independent director” as under:-

“149. Company to Have Board of Directors

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(6) An independent director in relation to a company, means a director other than a managing director or a whole-time director or a nominee director,--

(a) who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience;

(b) (i) who is or was not a promoter of the company or its holding, subsidiary or associate company;

(ii) who is not related to promoters or directors in the company, its holding, subsidiary or associate company.”

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(12) Notwithstanding anything contained in this Act,-

(i) an independent director;

(ii) a non-executive director not being promoter or key managerial personnel,

shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently.”

17. Admittedly, the petitioners are neither the Managing Directors nor the Authorized Signatories of the accused company. The accused company and the Managing Director are arrayed as accused No.1 and 2 along with others in the complaint pending before the concerned Metropolitan Magistrate. A perusal of the complaint filed under Section

138 r/w Sections 141/142 of NI Act filed by the complainant shows that except for the general allegation stating that the petitioners were responsible for control and management and day to day affairs of the accused company, no specific role has been attributed to the petitioners. To fasten the criminal liability under The Negotiable Instruments Act, 1881, the above generalised averment without any specific details as to how and in what manner, the petitioners were responsible for the control and management of affairs of the company, is not enough.

18. In Pepsi Foods v. Special Judicial Magistrate and Ors. reported as (1998) 5 SCC 749, it was held that summoning an accused person cannot be resorted to as a matter of course and the order must show due application of mind.

19. In view of the facts of the case and the aforementioned enunciation of law, I deem it fit to allow the present petition. The impugned order with respect to summoning the present petitioners for the offence under Section 138 of NI Act, is thus quashed.

20. Copy of this order be communicated to the concerned trial court.

(MANOJ KUMAR OHRI)
JUDGE

MARCH 03, 2020

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