

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

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Date of Decision: 25th October, 2016

+ CRL.M.C. 4919/2015 and Crl.M.A.No.17611/2015

MOHINI AGGARWAL & ANR

..... Petitioners

Through: Ms. Meenakshi Jyoti, Advocate.

versus

DEEPIKA SAREES PRIVATE LIMITED & ORS

..... Respondents

Through: Mr. Mehul Gupta, Advocate for R-2.

AND

+ CRL.M.C. 4028/2015 and Crl.M.A.No.14341/2015

MS RICHA AGGARWAL

..... Petitioner

Through: Ms. Meenakshi Jyoti, Advocate.

versus

M/S DEEPIKA SAREES PVT LTD & ORS

..... Respondents

Through: Mr. Mehul Gupta, Advocate for R-2.

CORAM:
HON'BLE MR. JUSTICE I.S.MEHTA

I.S. MEHTA, J.

1. The present petitions are arising out of the impugned summoning order passed by MM(C-02) Delhi in CC No. 2011/1/14 dated 28.01.2015. The present petitioners aggrieved from the impugned summoning order passed in CC No. 2011/1/14 dated 28.01.2015 preferred to file two separate petitions mentioned herein above, i.e., CRL.M.C. 4919/2015 and CRL.M.C. 4028/2015.
2. The brief facts stated in the petitions are that a complaint under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881 was filed *qua* against the present petitioners by the respondent, i.e., M/s Deepika Sarees Private Limited, through its Director Mr. Vibhor Aggarwal.
3. It was alleged in the complaint petition that the Company-M/s. Meenakshi Sarees Pvt. Ltd., through its Managing Director-Mr. Vineet Aggarwal, resident of 733/734, Mukherjee Nagar, Meerut Sweet Wali Gali, Opposite Batra Cinema, Delhi, had made a request to the respondent-M/s Deepika Sarees Private Limited, for purchase of sarees on short term credit basis on behalf of M/s Meenakshi Sarees Pvt. Ltd. Consequently, Mr. Vibhor Aggarwal, Director of M/s Deepika Sarees Private Limited supplied sarees from time to time to M/s Meenakshi Sarees Pvt. Ltd. amounting to Rs.27,00,000/- (Rupees Twenty Seven Lakhs).

4. Subsequently, Mr. Vineet Aggarwal, Director of M/s Meenakshi Sarees Pvt. Ltd. accepted the sale amount to be loan amount *qua* against his Company M/s. Meenakshi Sarees Pvt. Ltd. and issued two post dated cheques in the sum of Rs.12 Lakhs and Rs.15 Lakhs vide cheques no. 414228 and 565425, dated 20.09.2014, drawn on the current account of M/s. Meenakshi Saree Centre Pvt. Ltd. in ING Vysya Bank, Chandni Chowk branch, Dariba Kalan, Delhi.
5. The said cheques were presented on 03.11.2014 and later on, were dishonoured vide dishonour memo dated 05.11.2014, attracting the provisions of Section 138 read with Section 141 of the Negotiable Instruments Act, 1881.
6. The respondent/complainant, i.e., M/s Deepika Sarees Private Limited, filed a complaint under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881 *qua* against M/s. Meenakshi Sarees Private Ltd. by placing reliance on the Form-32 as well as other material documents and subsequently, tendered an affidavit of Mr. Vibhor Aggarwal as pre summoning evidence and the learned Metropolitan Magistrate registered the said complaint petition as CC No. 2011/1/14 and passed the 'impugned summoning' order dated 28.01.2015.
7. Aggrieved from the aforesaid summoning order, the present petitioners filed two separate petitions under Section 482 of the Cr.PC i.e., CRL.M.C. 4919/2015 and CRL.M.C. 4028/2015, respectively.

Hence the present petitions.

8. The learned counsel appearing for the petitioners submits that the petitioners have two separate petitions before this Court, i.e., CRL.M.C. 4919/2015 and CRL.M.C. 4028/2015, respectively and both are connected matters. The petitioners in both the petitions are present Directors of the Company, i.e., M/s. Meenakshi Saree Centre Private Limited. The learned counsel for the petitioners further submits that the petitioners on the date of the issuance of the cheques in question were not the Directors of the Company. In this regard, she has placed reliance on copy of Form-32 obtained from ROC, which is placed on record.
9. The learned counsel for the petitioners further submits that the allegation that the cheques were issued by the petitioners on 20.09.2014 is a false allegation, as on the said date the petitioners were not the Directors of the said Company and were not looking after the business on day-to-day basis. She further submits that it is because of this reason that the petitioners were unaware about the issuance of the cheques in question. She further submits that if at all any liability arises because of the act of any other Director of the Company then the same falls within the meaning of civil liability *qua* against the present petitioners. She further submits that on the date of the issuance of the cheques in question, there was no existing liability and hence no cause of action would have arisen to attract the ingredients of Section 138 of the Negotiable Instruments Act. The learned counsel for the petitioners, have relied upon the judgment of this Court in the case of ***M/s. IKF Technologies Ltd. Ors. Vs. Sasi Bhusan Raju, Crl. M.C. 4687-90/2006***, in support of her contentions and stated that there

should be an existing debt or liability in order to attract criminal liability under Section 138 of the Negotiable Instruments Act.

10. The learned counsel for the petitioners further relied on an Apex Court judgment titled as ***Pooja Ravinder Devidasani Vs. State of Maharashtra & Anr., SLP (CRL) Nos. 9133-9139 of 2010***, wherein a complaint was quashed as the appellant was neither a Director of the accused Company nor in charge of or involved in the day to day affairs of the Company at the time of commission of the alleged offence.
11. The learned counsel for the respondent, i.e., M/s Dipika Sarees Private Limited, on the other hand, submits that the cheques in question were issued on 20.09.2014. The learned counsel by placing reliance on the Form-32, points out that one of the petitioners, i.e., Ms. Mohini Aggarwal, was the Director of M/s. Meenakshi Sarees Centre Private Limited since the year 2009, which *ipso facto* is sufficient to dispel the arguments advanced by learned counsel for the petitioners.
12. The learned counsel for respondent further submits that once the petitioner (in CRL.M.C. 4919/2015) was the Director of the Company (M/s. Meenakshi Saree Centre Private Limited) as per the Form-32, the cheques in question issued in favour of the respondent itself creates a criminal liability against the present petitioner and she cannot take the benefit of escaping her liability under Section 138 of the Negotiable Instruments Act. He further submits that the Company (M/s. Meenakshi Saree Centre Private Limited) is a closely held Company and, therefore, it cannot be averred that they were unaware about the issuance of the cheques in question.

13. The learned counsel for the respondent further submits that both the petitions suffer from merit and the same are liable to be dismissed.

Further the learned counsel placing reliance on the decision of the Apex Court reported as *Mainuddin Abdul Sattar Shaikh Vs. Vijay D. Salvi*, (2015) 9 SCC 622 and a judgment of this Court reported as *Rajesh Aggarwal Vs. State*, 171 (2010) DLT 51, contends that it is a settled law that unless and until notice under Section 251 Cr.P.C. is framed against the accused by the concerned Court, no quashing of the complaint under Section 138 of the Negotiable Instruments Act can be sought by the accused. He further submits that admittedly in the present case, notice under Section 251 Cr.P.C. has not yet been framed against the petitioners and hence they are estopped from approaching this Court seeking quashing of the complaint.

14. On the contrary, the learned counsel for the petitioners in the present petitions has stated that M/s. Meenakshi Sarees Private Limited and M/s Meenakshi Saree Centre Private Limited are two separate legal entities and Notice issued is *qua* against M/s. Meenakshi Sarees Private Limited and its Directors. M/s. Meenakshi Saree Centre Private Limited has never purchased sarees as alleged. M/s. Meenakshi Saree Centre Private Limited does not owe any sum to the respondent No.1, i.e., M/s Deepika Sarees Private Limited, and further denied any cheques having been issued by the deceased-Mr. Vineet Aggarwal. The petitioners were not the Directors of the Company on the date of purchase of the sarees from the respondent and Notices required under Section 138 of the Negotiable Instruments Act were not served upon the petitioners.

15. This Court while giving thoughtful consideration to the arguments advanced by the learned counsels on either side at length, the question arises for determination is, whether the petitioners are liable for prosecution under Section 138 read with Section 141 of the Negotiable Instruments Act for the alleged offence of dishonour of cheques committed by the default Company?

16. The Hon'ble Supreme Court in the judgment reported as *National Small Industries Corporation vs. Harmeet Singh Paintal & Anr., (2010) 3 SCC 330* has observed 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 the offence under Section 141 of the Negotiable Instruments Act. The relevant para of the judgment is reproduce as under:

*“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 No. 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 fulfilment of the requirements under Section 141.”

17. Further, the Apex Court in the judgment reported as ***Girdhari Lal vs. D.H. Mehta & Anr. (1971) 3 SCC 189*** has already held that a person ‘in charge of the business’ means that the person should be in overall control of the day to day business of the Company.

18. The instant petitions are arising out of the impugned summoning order dated 28.01.2015 passed by the Court below in CC No. 2011/1/14 which is reproduced as under:-

*“CC No. 2011/1/14
28.01.2015*

Present: AR of the complainant in person along with Ld. counsel.

The form-32 of the accused no.1 company has been submitted as per which the accused no. 2 and 3 are shown to be the Directors of the accused no. 1 company. PSE has already been led in this matter.

Pre-summoning evidence by way of affidavit has been tendered. Arguments have been heard upon the point of summoning of the accused. After going through the complaint, documents attached with it and testimony of the complainant. I am of the view that prima facie offence U/s 138 of Negotiable Instruments Act is made out. All the statutory requirements have been complied with. Case filed is within the period of limitation. Let the accused be summoned on filing of PF, RC and Speed Post. Accused be served through affixation also in terms of section 65 Cr.P.C.. Now, to come up on 30/04/2015.

Steps to be taken within two weeks from today. Complainant is at liberty to accompany with the process server for service of the summons.

*Sd/-
(Riya Guha)
MM(C-02)/Delhi
28.01.2015”*

19. The respondent, i.e., M/s Deepika Sarees Private Limited, had filed a complaint petition CC. No. 2011/1/14 under Section 138 read with Section 141 of the Negotiable Instruments Act *qua* against the present petitioners relying on Form-32 of the Company, i.e., M/s Meenakshi Saree Centre Private Limited. The Form-32 relied upon by the respondent, i.e., M/s Deepika Sarees Private Limited, in the complaint petition CC. No. 2011/1/14 is reproduced as under:-

“4/22/2015 MCA21 ::Register DSC: View Signatory Details

<i>View Signatory Details</i>						
<i>Company/LLP Name</i>	MEENAKSHI SAREE CENTRE PRIVATE LIMITED					
<i>CIN/LLPIN</i>	U18202DL2009PTC188313					

List of Signatories

<i>DIN/DPI N/PAN</i>	<i>Full Name</i>	<i>Present residential address</i>	<i>Designation</i>	<i>Date of Appointment</i>	<i>Whether DSC Registered</i>	<i>Expiry Date of DSC</i>
02498408	MOHINI AGARWAL	734, MUKHERJEE NAGAR, DELHI, 110009, Delhi, INDIA	Director	<u>09/03/2009</u>	NO	*
06987801	RICHA AGGARWAL	734, MUKHERJEE NAGAR, DELHI, DELHI, 110033,	Additional director	<u>22/09/2014</u>	YES	(illegible)

		Delhi, INDIA				
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(Emphasis supplied)”

20. The Form-32 and the complaint petition CC. No. 2011/1/14 filed under Section 138 read with Section 141 of the Negotiable Instruments Act, on the date of the filing, shows that there were two Directors, i.e., Ms. Mohini Agarwal and Ms. Richa Aggarwal of the Company. Ms. Mohini Aggarwal was appointed as Director of the Company, i.e., M/s Meenakshi Saree Centre Private Limited, on 09.03.2009 and Ms. Richa Aggarwal was appointed as Additional Director of the said Company, on 22.09.2014.
21. As per the allegation alleged in para 8 of the complaint petition, there was a liability of Rs.27 Lacks *qua* against the Company-M/s Meenakshi Sarees Private Limited, during the business transaction between the parties, which was acknowledged by Mr. Vineet Aggarwal Managing Director of the Company and in order to execute the said liability he issued two cheques vide cheque No. 414228 and 565425, dated 20.09.2014, amounting to Rs.12 Lacks and Rs.15 Lacks respectively, drawn on the current account of M/s. Meenakshi Saree Centre Pvt. Ltd. in ING Vysya Bank, Chandni Chowk branch, Dariba Kalan, Delhi.
22. Further, as per para 11 of the complaint petition the said Managing Director, i.e., Mr. Vineet Aggarwal, has expired on 25.09.2014. The said paras 8 and 11 of the complaint petition are reproduced as under:

“8. That the accused failed and neglected to pay the said outstanding principal amount and later on Sh. Vineet Aggarwal,

Managing Director of the Accused company approached the Complainant and requested Complainant to grant loan of the said amount which would incur interest @ 12% p.a.. He further promised to liquidate the said amount within a short time and till such time, it would carry interest. The said proposal came through broker Sh. Mukut Bihari earlier also. The Complainant agreed to treat the said outstanding amount as loan to the Accused company. Sh. Vineet Aggarwal for and on behalf of the Accused(s) acknowledged the said liability in the sum of Rs. 12 Lakhs and Rs. 15 Lakhs vide receipt dated 30.05.2014 and 26.06.2014. A duly signed receipt has been handed over to the Complainant. In order to secure the repayment of the said amount, two post dated cheques in the sum of Rs. 12 lakhs and Rs. 15 lakhs vide cheque no.414228 and 565425 dated 20.09.2014 drawn on the current account of the Accused company ING Vysya Bank, Branch at Chandni Chowk, Dariba Kalan, Delhi were issued payable on 20.09.2014. The copy of the receipt dated 30.05.2014 and 26.06.2014 executed by the Accused Company in the name of the Complainant company acknowledging its liability are being annexed herewith to the present complaint.

11. That it is learnt that Sh. Vineet Aggarwal, Director of the Complainant Company has since expired on 25.09.2014. The accused company have failed to keep up their commitment/promise and have failed to pay, inspite of writing for sufficient time even after the demise of Sh. Vineet Aggarwal, no effort to liquidate the joint and severable liability has been made by the accused company or its other authorized directors.”

23. However, the respondent, i.e., M/s Deepika Sarees Private Limited, in its complaint petition in para 13 has stated that Smt. Mohini Agarwal was one of the principal directors of the Company, being the mother of Mr. Vineet Aggarwal which is reproduced as under:

“13. That the Accused no. 2 Smt. Mohini Aggarwal is one of the principal directors of the accused company besides being the mother of Sh. Vineet Aggarwal since deceased.”

24. The notice issued by the respondent, i.e., M/s Deepika Sarees Private Limited, against the petitioners is dated 12.11.2014 and the reply thereof is dated 27.11.2014, in which the petitioners had denied their liability jointly and severely.
25. It is the case of the respondent, i.e., M/s Deepika Sarees Private Limited, that, the two cheques, i.e., cheques no. 414228 and 565425 dated 20.09.2014, in question were, issued by Mr. Vineet Aggarwal, Managing Director of the Company, i.e., M/s Meenakshi Sarees Private Limited. Further, it is an admitted case of the respondent that Mr. Vineet Aggarwal died on 25.09.2014.
26. The offence under Section 138 read with Section 141 of the Negotiable Instruments Act is committed when *actus reus* specifies the consequence, it is not enough that the person had engaged in voluntary conduct with relevant state of mind. The commission of the offence must be proved that the consequence was caused by some conduct on his/her part to constitute substantial cause for arising its consequences.
27. The instant petitions are arising from the complaint petition filed by the respondent, i.e., M/s Deepika Sarees Private Limited, in CC. No. 2011/1/14 under Section 138 read with Section 141 of the Negotiable Instruments Act, wherein it was alleged by the respondent that the two cheques in question were issued by the Managing Director, i.e., Mr. Vineet Aggarwal, of the Company, i.e., M/s Meenakshi Saree Private Limited, on 20.09.2014. Subsequently, the said Managing Director-Mr. Vineet Aggarwal has admittedly died on 25.09.2014.

28. The Form-32 of the Company, i.e., M/s Meenakshi Saree Centre Private Limited, shows that one of the petitioners, i.e., Ms. Richa Aggarwal, became the Additional Director of the Company on 22.09.2014 and the cheques in question were issued two days prior to her appointment by the Managing Director, i.e., Mr. Vineet Aggarwal, who died on 25.09.2014 after issuance of the said cheques in question.
29. So far as the appointment of directorship of Ms. Mohini Aggarwal is concerned with the Company, i.e., M/s Meenakshi Saree Centre Private Limited, it is shown to be dated 09.03.2009 as the Director of the Company. It is the case of the respondent, i.e., M/s Deepika Sarees Private Limited, that the cheques in question were issued by the Managing Director-Mr. Vineet Aggarwal. There is no change of state of mind after the issuance of the two cheques, i.e., cheques no. 414228 and 565425 dated 20.09.2014, in question by the Managing Director, i.e., Mr. Vineet Aggarwal, on the part of Ms. Mohini Aggarwal which shows her ignorance about her liability vide reply dated 27.11.2014.
30. Both the petitioners vide reply dated 27.11.2014 disputed their liability as nothing *actus reus* in furtherance of common acts constituting criminal liability on their person.
31. The Apex Court in the judgment reported as ***Pepsi Foods Ltd. and Anr. vs. Special Judicial Magistrate and Ors., 1998 5 SCC 749***, while dealing with the summoning of an offence in a criminal case has observed that summoning of an accused in a criminal case is a serious matter. The criminal law cannot be set in motion as a casual matter. The relevant para of the judgment is reproduced as under:

“28. Summoning of an accused in a criminal cases is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put question to the complainant and his witnesses to elicit answers to out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.”

32. Instant is a case where the learned Magistrate has not gone into the depth of From-32, where the petitioner i.e., Ms. Richa Aggarwal, was not even an existing Director of the Company at the time of issuance of the said cheques in question. The learned Magistrate has not gone into the depth of the cause of action arisen *qua* against the petitioner, i.e., Ms. Mohini Aggarwal, as the cheques in question were issued by the deceased Managing Director, i.e., Mr. Vineet Aggarwal, of the Company on 20.09.2014 and subsequently, there was no occasion of *actus reus* on the part of Ms. Mohini Aggarwal. It is because of this reason she had replied to the notice dated 12.11.2014 that she does not owe any liability as alleged in the said notice.
33. There is no other factor or circumstance which could show any change of state of mind of Ms. Mohini Aggarwal after issuance of the cheques in question by the deceased, i.e., Mr. Vineet Aggarwal, till the

filing of the complaint petition CC. No. 2011/1/14 by the respondent to attract the provisions of Section 138 read with Section 141 of the Negotiable Instruments Act. The aforesaid facts on record only indicates liability if so there is, it could be of civil liability and not criminal liability, which could be put into motion under Section 138 read with Section 141 of the Negotiable Instruments Act. Reliance is placed on the judgment of the Apex Court in the case of *Pooja Ravinder Devidasani(supra)*.

34. This Court finds no merit in the contentions of the learned counsel for the respondent and the judgments relied are not helpful to them.

35. Consequently, both the petitions, i.e., CRL.M.C. 4919/2015 and CRL.M.C. 4028/2015, are allowed and the impugned order dated 28.01.2015 in CC No. 2011/1/14 is set aside and the personal bond and bail bond is discharged.

Let one copy of this judgment be placed on the file of CRL.M.C. 4028/2015.

No order as to costs.

I.S.MEHTA

(JUDGE)

OCTOBER 25, 2016