* IN THE HIGH COURT OF DELHI AT NEW DELHI

% ***Judgment delivered on: 19th December, 2017***

\+ CRL.M.C. 215/2015 & CRL.M.A. 869/2015

1. NITIN CHAWLA ..... Petitioner

Through: Mr. Ashish Upadhay, Advocate with Mr. Pradeep Kr. Mishra, Advocates.

versus

1. M/s AHUJA CREATIONS PVT. LTD.
2. STATE OF NCT, DELHI ..... Respondents

Through: Mr. Raghuvinder Varma, APP for State.
Mr. Rajesh Mahindru, Advocate.

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

## JUDGMENT

**I. S. MEHTA, J.**

1. By way of the instant petition the petitioner-Nitin Chawla, invokes inherent jurisdiction of this Court under Section 482 Cr.P.C. for quashing of the summoning order dated 10.12.2010 and the order dated 21.06.2014 passed by the learned Metropolitan Magistrate (C-02), Delhi in CC. No. 707/RN/10.

2. The brief facts stated are that the respondent No. 1/complainant- M/s. Ahuja Creations Pvt. Ltd. had filed a

complaint under Section 138 of the Negotiable Instruments Act, 1881 (*hereinafter referred to as NI Act*) on 3rd December, 2010 in the Court of the Chief Metropolitan Magistrate, Delhi against the accused persons, i.e. (1) M/s Catmoss Retail P. Ltd., (2) Mr. Nitin Chawla (petitioner herein) and (3) Mr. A.K. Chawla. It is stated in the complaint that the respondent No.1/complainant is a company duly incorporated under the Companies Act, engaged in the business of manufacturing and supply of buttons and rivets of various kinds and the accused No1/Company- M/s Catmoss Retail P. Ltd. is one of the customers of the respondent No.1.

3. It is alleged in the said complaint that the accused No.1- M/s Catmoss Retail Pvt. Ltd. is a private limited Company and accused No.2 (petitioner herein) and accused No.3 are its directors and are responsible for the day to day transactions of the accused No.1 Company as they are in actual control of the entire business of the accused No.1 Company. It is further alleged that the petitioner herein and the accused No.3 approached the respondent No.1/complainant for purchasing the material manufactured by them. Thereafter, the respondent No.1/complainant supplied the material to the said accused and raised an invoice for the last more than one year. It is further alleged that the accused persons have not been regular in making the payment of the material purchased by them and as per the books of accounts a sum of Rs. 16,71,802/- was due and outstanding qua against the accused.

4. Further it is also alleged that the representatives of the respondent No.1/complainant met both the accused No.2 (petitioner

herein) and the accused No.3 at number of times and after great follow-up, the accused No.2 (petitioner herein) and the accused No.3 issued two cheques in favour of the respondent No.1/complainant, i.e. (1) Cheque No. 090759 dated 10.10.2010 of Rs. 2,57,073/- (Two Lakhs Fifty Seven Thousand Seventy Three Only) and (2) Cheque No. 090760 dated 15.10.2010 of Rs. 3,01,125/- (Three Lakhs One Thousand One Hundred Twenty Five Only), both drawn on State Bank of India, Shahdara Branch, Delhi with assurance that the said cheques would be encashed on presentation.

5. It is further alleged that when the above said cheques were presented by the respondent No.1/complainant with its banker, i.e. Canara Bank, Karol Bagh Branch, Delhi, for encashment both the cheques were dishonoured vide memo dated 22.10.2010 in respect of Cheque No. 090759 dated 10.10.2010 of Rs. 2,57,073/- (Two Lakhs Fifty Seven Thousand Seventy Three Only) and vide return memo dated 30.10.2010 in respect of Cheque No. 090760 dated 15.10.2010 of Rs. 3,01,125/- (Three Lakhs One Thousand One Hundred Twenty Five Only), with the remarks "Payment Stopped".

6. Thereafter, the respondent No.1/complainant issued a legal notice dated 12.11.2010 against the accused persons (including the petitioner herein) which was duly served upon them. However, when the accused persons failed to make the payment despite expiry of 15 days notice period, the respondent No.1/complainant was constrained to filed a complaint under Section 138 of NI Act in

the Court of the Chief Metropolitan Magistrate, Tis Hazari Court, Delhi against the accused persons including the petitioner herein.

7. Consequently, the learned Metropolitan Magistrate after going through the complaint, documents attached with it and testimony of the respondent No.1/complainant vide order dated 10.12.2010 took cognizance of the offence punishable under Section 138 of the NI Act and issued summons to the accused persons (including the petitioner herein) in CC No. 707/RN/10.

8. Aggrieved from the said order the petitioner filed a petition being CRL.M.C. 506/2014 under Section 482 Cr.P.C. for quashing of impugned summoning order dated 10.12.2010 before this Court and this Court vide order dated 31.01.2014 dismissed the petition as withdrawn with liberty to the petitioner to urge all the pleas before the learned Trial Court at the time of arguments on the point of notice under Section 251 Cr.P.C.

9. Subsequently, the petitioner filed an application before the learned Metropolitan Magistrate, Tis Hazari, District Court, New Delhi for dropping of the proceedings against him in compliance of the judgment of this Court in CRL.M.C. 2598/2012 titles as *Urrshilla Kerkar vs. Make My Trip (India) Pvt. Ltd.* as well as in terms of the order dated 31.01.2014 passed by this Court in CRL.M.C. 506/2014 and the learned Metropolitan Magistrate vide order dated 21.06.2014 dismissed the said application of the petitioner for want of merit.

Hence, the present petition.

10. The learned counsel for the petitioner has submitted that the petitioner-Nitin Chawla was not the Director of M/s Catmoss Retail Pvt. Ltd./accused No.1 at the relevant point of time and the respondent no. 1 had arrayed the petitioner as an accused stating him to be the director of the company. Therefore, the summoning order dated 10.12.2010 is bad in law and the same be set aside.

11. The learned counsel for the petitioner has further submitted that it is evident from the Form No. 32, which is unimpeachable public document capable of being translated into evidence which shows that the petitioner was not the director of the accused No.1/Company- M/s Catmoss Retail P. Ltd. The Hon'ble Supreme Court in case ***National Small Industries Corporation Ltd. vs. Harmeet Singh Paintal and Anr.; 2010 (3) SCC 330*** has considered that the Revisionist is only a nominated independent director and therefore the Revisionist is not a person in charge of and responsible for the affairs of the company and cannot be made vicariously liable under section 141 (1) of NI Act. Reliance is also placed on the following judgments:-

1) ***Deepika Malhotra and Ors. vs. Kanti Lal Jains; (2013)(1) DCR 731***.
2) ***K.K. Ahuja vs. V. K. Vora and Another; (2009) 10 SCC 48.***
3) ***J. N. Bhatia and Others vs. State and Another; 2008 IITR 276 Delhi.***

12. On the contrary the learned counsel appearing on behalf of the respondent No.1 has submitted that the petitioner along with the other accused No.3 approached the respondent No.1 for the

purchase of material, payment advices and entered into all the transactions with the respondent No.1. They issued two cheques i.e. Cheque No. 090759 dated 10.10.2010 and Cheque No. 090760 dated 15.10.2010 in favour of the respondent No.1 and the petitioner along with other accused gave assurances that the cheques would be encashed. Also, it was specifically stated in the complaint that the petitioner along with the other accused are the directors/authorized representative of the accused No.1 Company and in actual control of the business and have done the entire business transactions with the respondent No.1.

13. The learned counsel for the respondent No.1 has further submitted that the petitioner has mislead this Court by not disclosing the fact that the notice under section 251 Cr.P.C. has already been framed by the learned Metropolitan Magistrate on 21.08.2012 and even the statement of the accused under Section 313 Cr.P.C. has been recorded on 19.11.2013, and still the petitioner has made incorrect statement and took liberty from this Court to take all the pleas before the learned Metropolitan Magistrate at the time of framing of notice under Section 251 Cr.P.C. He has further submitted that the petitioner has concealed the material facts from this Court.

14. The learned counsel for the respondent No.1 has further submitted that the respondent No.1 has filed documents on record to show that it was the petitioner who has signed the purchase order, payment advices and that also placed on record the affidavit of accused No.3, i.e. Mr. Ashwini Chawla, Managing Director of

the accused company, which was filed by him in the civil suit filed by the respondent No.1. wherein the accused No.3 has stated in the said affidavit that the present petitioner is the director of the company and has been dealing with the respondent No.1. It is further submitted that even the Vakalatnama, filed by the counsel of the petitioner before the trial court shows that the petitioner has presented himself to be the director of the company. Therefore, the present petition is devoid of merit and is liable to be dismissed.

15. The whole dispute hinges around whether the petitioner is jointly & severally responsible for the day to day conduct of the business of the accused No.1-Company-M/s Catmoss Retail P. Ltd. as alleged by the respondent No.1/complainant in the complaint under Section 138 NI Act?

16. The allegations in the complaint petition under Section 138 NI Act are that the petitioner in discharge of his legally enforceable liability issued the two cheques in question from the account pertaining to the accused No.1-Company- M/s Catmoss Retail P. Ltd. which were dishonoured on presentation therefore, the petitioner, the Company and the other director of the Company are equally, jointly & severally responsible & punishable for the offence under Section 138 NI Act.

17. The notice under Section 251 Cr.P.C. qua against the petitioner was framed on 21.08.2012 wherein the petitioner has pleaded not guilty and claimed trial and has taken the defence that he is not the director of the accused Company and even the cheques were not

issued under his signatures and to lead defence evidence. The present petitioner did not replied to the said legal demand notice dated 12.11.2010 saying that he is not the director of the accused No.1-Company- M/s Catmoss Retail P. Ltd. and he is not responsible for the day to day affairs of the Company therefore, he has no liability qua against the respondent No.1/complainant.

18. 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. 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."*

19. 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.

20. The instant petitions are arising out of the impugned orders dated 10.12.2010 and the order dated 21.06.2014 passed by the learned Metropolitan Magistrate (C-02), Delhi in CC. No. 707/RN/10.

21. The respondent No.1/complainant- M/s. Ahuja Creations Pvt. Ltd, had filed a complaint petition CC. No. 707/RN/10 under Section 138 of the Negotiable Instruments Act qua against the present petitioner relying on Form-32 of the Company, i.e. M/s Catmoss Retail P. Ltd.

22. The Form-32 relied upon by the respondent No. 1/complainant, in the complaint petition CC. No. 707/RN/10 filed under Section 138 of the Negotiable Instruments Act, shows the following persons were Directors, i.e. Mr. Ashwani Chawla (Managng Director), Mr. Sunil Kumar Bansal (Director), Ms. Reena Chawla

(Director), Mr. Mukul Singhal (Director), of the Company M/s Catmoss Retail P. Ltd.

23. As per the allegation alleged in para No. 3 of the complaint petition, there was a liability of Rs. 16,71.802/- qua against the Company-M/s Catmoss Retail P. Ltd., during the business transaction between the parties, which was acknowledged by accused No.3-Mr. Mr. Ashwani Chawla (Managing Director) of the accused Company- M/s Catmoss Retail P. Ltd., and in order to execute the said liability he issued two cheques vide Cheque No. 090759 dated 10.10.2010 of Rs. 2,57,073/- (Two Lakhs Fifty Seven Thousand Seventy Three Only) and (2) Cheque No. 090760 dated 15.10.2010 of Rs. 3,01,125/- (Three Lakhs One Thousand One Hundred Twenty Five Only), drawn on the current account of M/s Catmoss Retail P. Ltd., in State Bank of India, Shahdara Branch, Delhi.

24. It is the case of the respondent No.1/complainant, that, the two cheques, i.e., cheques Nos. 090759 and 090760, in question were, issued by the petitioner-Mr. Nitin Chawla and Mr. A.K. Chawla/accused No.3, directors of the Company, i.e. M/s Catmoss Retail P. Ltd.

25. 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.

26. The instant petition is arising from the complaint petition filed by the respondnent No.1/complainant being CC. No. 707/RN/10 under Section 138 of the Negotiable Instruments Act, wherein it was alleged by the respondent No.1 that the two cheques in question were issued by the accused No.2 (petitioner herein) and accused No.3.

27. The Form-32 of the Company, i.e. M/s Catmoss Retail P. Ltd., placed on record shows that the accused No.3- Mr. A. K. Chawla became the Managing Director of the Company on 01.07.2010 and the cheques in question were issued on 10.10.2010 and 15.10.2010.

28. So far as the appointment of directorship of the petitioner-Mr. Nitin Chawla is concerned with the Company, i.e. M/s Catmoss Retail P. Ltd., it is not shown in the Form 32 of the Company. It is the case of the respondent No.1/complainant that the cheques in question were issued by the petitioner and the accused No.3- Mr. A. K. Chawla. There is no change of state of mind after the issuance of the two cheques in question by the accused No.3- Mr. A. K. Chawla, on the part of the petitioner which shows his ignorance about his liability by not replying to the notice dated 12.11.2010. The petitioner while taking the defence on notice under section 251 Cr.P.C. disputed his liability as nothing *actus reus* in furtherance of common acts constituting criminal liability on his person as he was not the director of the Company nor did he issued the cheques in question.

29. 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."*

30. Instant is a case where the learned Magistrate has not gone into the depth of From-32, where the petitioner i.e., Mr. Nitin Chawla, 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 as the cheques in question were issued by the Managing Director, i.e. Mr. A.K. Chawla, of the Company and subsequently, there was no occasion of *actus reus* on the part of the petitioner. It is because of this reason he took the defence to the notice under Section 251 Cr.P.C. dated 21.08.2012 that he does not owe any liability as alleged in the said notice.

31. The aforesaid facts on record only indicates liability if so there is, it could be of civil liability and not criminal liability qua against the petitioner, 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 Vs. State of Maharashtra & Anr.; MANU/SC/1177/2014*** and the relevant para is reproduced as under:-

> *"30. Putting the criminal law into motion is not a matter of course. To settle the scores between the parties which are more in the nature of a civil dispute, the parties cannot be permitted to put the criminal law into motion and Courts cannot be a mere spectator to it. Before a Magistrate taking cognizance of an offence Under Section 138/141 of the N.I. Act, making a person vicariously liable has to ensure strict compliance of the statutory requirements. The Superior Courts should maintain purity in the administration of Justice and should not allow abuse of the process of the Court. The High Court ought to have quashed the*

*complaint against the Appellant which is nothing but a pure abuse of process of law."*

32. This Court also in case ***Birthe Foster vs. State and Anr.; MANU/DE/9335/2006*** has made the observation as under:-

> *"3. It is clear that Section 138 refers to persons who issue cheques on accounts maintained by them. If the persons happen to be juristic persons such as companies then the provision of Section 141 would apply. By virtue of provision 141 not only the company which issues the cheque is made liable but, also the person who, at the time of the offence was committed, was in charge of and was responsible to the company for the conduct of the business of the company has been made liable along with the company. A reading of Section 141(2) of the Negotiable Instruments Act, 1881 gives an indication as to who those persons might be. The persons mentioned in Sub-section (2) of Section 141 are 'any director', manager, secretary or other officer of the company. This gives an indication as to which persons would fall within the purview of Section 141(1) of the said Act. The petitioner is neither a director, manager, secretary or other officer of the company. Furthermore, the petitioner even otherwise was not in charge of or responsible to the accused No. 1 company for the conduct of the business of the said company. It is another matter that as an agent, the petitioner may have handled transactions for and on behalf of the company in India but that does not bring the petitioner within the purview of Section 141 which, in my view, is restricted to an officer of the company or a director of manager or secretary. That being the case. The summoning order, insofar as the petitioner is concerned, is liable to be set*

*aside. The same is set aside and quashed to this extent."*

(Underlining supplied)

33. Therefore, in view of the above discussions this Court finds no merit in the contentions of the learned counsel for the respondent No.1 and the judgments relied are not helpful to them in the present facts and circumstances of the case.

34. Consequently, the impugned summoning order dated 10.12.2010 qua against the present petitioner is bad and the same is set aside to this extent only and order dated 21.06.2014 passed in CC No. 707/RN/10 too is set aside. The present petition is allowed accordingly.

35. LCR file be sent back forthwith along with a copy of this judgment.

36. All the pending applications (if any) are also disposed of accordingly. No order as to costs.



**I.S.MEHTA, J**

**DECEMBER 19, 2017**