Before Mehinder Singh Sullar, J.

VARINDER KUMAR GUPTA AND OTHERS—*Petitioners*

versus

M/S CREATIVE CLOTHING—*Respondent*

CRM No. M -600 of 2012

MAY 14, 2013

Code of Criminal Procedure, 1973 - S. 482 - Negotiable Instruments Act, 1881 - S. 138 & 141 - Indian Penal Code, 1860 - S.420 - Complaint under section 138 read with 420 IPC - Trial court summoned petitioners/accused u/s 138 - Petitioners challenged complaints and summoning orders u/s 482 CrPC on the grounds that complainant not pleaded that accused are responsible as contemplated u/s 141 of N.I. Act - Trial court mechanically summoned and the order is non-speaking - Petition partly allowed, Summoning order quashed and case remitted back to decide afresh

Held, that 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 complaint and the evidence both oral and documentary in support thereof, relatable to the relevant provisions of the offences and that would 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 preliminary evidence. The accused cannot be summoned in a routine manner.

(Para 15)

Further held, that therefore, the impugned summoning orders are not only non-speaking, lack application of mind & illegal, but against the indicated statutory provisions as well. The same cannot be sustained in the eyes of law and deserve to be quashed in the obtaining circumstances of the cases.

(Para16)

Baldev Singh, Senior Advocate, with Sudhir Sharma, Advocate, *for the petitioners.*

Alok Jain, Advocate, *for the respondent.*

MEHINDER SINGH SULLAR, J. (ORAL)

(1)As identical questions of law and facts are involved, therefore, I propose to dispose of above indicated petitions, to quash the impugned complaints & summoning orders, by means of this common judgment, in order to avoid the repetition. However, the epitome of the facts, which requires a necessary mention for the limited purpose of deciding the core controversy, involved in the instant petitions, has been extracted from (1) CRM No.M-600 of 2012, titled as "**Varinder Kumar Gupta and others Versus M/s Creative Clothing"** for ready reference in this context.

(2) The matrix of the facts and material, culminating in the commencement, relevant for deciding the present petitions and emanating from the record, is that initially, complainant-respondent M/s Creative Clothing(for brevity "the complainant") has filed the criminal complaint under Section 138 of the Negotiable Instruments Act, 1881(hereinafter to be referred as the N.I.Act") read with Section 420 IPC, *inter alia,* pleading that the petitioners-accused are the Directors of M/s Koutons Retail India Limited(accused No.1). The impugned cheques issued by the accused in order to discharge their legal and enforceable liability were dishonoured. They did not make the payment of the impugned amount, despite legal notices within a statutory period. Thus, they have committed the indicated offences.

(3) Taking cognizance of the complaint(Annexure P-1), the trial Court summoned the petitioners-accused, to face the trial for the commission of offence punishable under Section 138 of the N.I.Act, by virtue of impugned summoning order dated 07.04.2011(Annexure P-2). The similar impugned summoning orders were passed as well in the other connected cases instituted on similar private complaints.

(4) Aggrieved thereby, the petitioners-accused have preferred the instant petitions, to challenge the impugned complaints and summoning orders, invoking the provisions of Section 482 Cr.P.C. in this Court.

(5) The case, *inter alia,* set-up by the petitioners-accused, in brief in so far as relevant is that, the complainants have filed the false complaints against them. They have been arrayed as accused only in the capacity of Directors of the Company, without pleading therein that they are, in any

way, responsible for the commission of the offences in question, as contemplated under Section 141 of the N.I.Act. The trial Court was stated to have mechanically summoned them without the application of mind, by way of non-speaking impugned summoning orders. On the strength of aforesaid grounds, the petitioners-accused sought to quash the impugned complaints and summoning orders, in the manner described here-in-above.

(6) Faced with the grave situation, although initially, the complainants have vaguely refuted the prayer of the petitioners in a routine manner, but during the course of hearing, their learned counsel has very fairly conceded and acknowledged that they have been arrayed as an accused only on account of Directors of Company(accused No.1) and no other specific role or overt-act as envisaged under Section 141 of the N.I. Act is attributed to them.

(7) Having heard the learned counsel for the parties, having gone through the record & legal provisions with their valuable assistance and after bestowal of thoughts over the entire matter, to my mind, the present petitions deserve to be partly accepted in this context.

(8) At the very outset, learned counsel for the petitioners accused did not press the prayer, for quashing the impugned complaints at this stage, without prejudice to their legal rights in any manner. *Ex facie,* the argument of the learned counsel for the petitioners that vague and non-speaking impugned summoning orders are not only arbitrary and illegal, but against the statutory provisions of Section 141 of the N.I.Act, has considerable force.

(9) As is evident from the record, that the complainants have filed the complaints under section 138 of the N.I. Act against the petitioners-accused only in the capacity of the Directors of Company (accused No.1). Sequelly, Section 141 postulates that if a person committed an offence under section 138 is a company, every person who, at the time of the offence was committed, was in-charge of, and was responsible to the company for the conduct of its business, 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.

(10) Likewise, proviso to this section further posits 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. For the purposes of this section, the term "company and director" have been defined in the Explanation contained therein.

(11) A conjoint and meaningful reading of these provisions would reveal that in order to attract the penal provisions of sections 138 and 141 of the NI Act, it was legally incumbent on the part of the complainants to plead that the persons (petitioners) were in-charge of, and responsible to the company for the conduct of its business at the time of commission of indicated offence and not otherwise, which is totally lacking in the present cases. This matter is no more res integra and is now well settled.

(12) An identical question came to be decided by Hon'ble Apex Court in case ***National Small Industries Corporation Limited*** versus ***Harmeet Singh Paintal and another (1).*** Having considered the relevant provisions of sections 138, 141 of the NI Act and line of earlier decisions on the point, it was ruled as under:-

> *"(i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.*
>
> *(ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.*
>
> *(iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make the accused therein vicariously liable for offence committed by the company*

(1) (2010) 3 SCC 330

along with averments in the petition containing that the accused were in charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

(iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.

(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.

(vi) If the accused is a Director or an officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in the complaint.

(vii) The person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases."

At the same time, it was held that 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.

(13) Similarly, the same ratio of law was again reiterated by Hon'ble Supreme Court in cases ***Central Bank of India*** versus ***Asian Global Limited (2)*** and ***Harshendra Kumar D.*** versus ***Rebatilata Koley and others (3)***.

(14) Meaning thereby, the petitioners-accused cannot possibly be termed to be accused solely on the ground that they were the Directors of the defaulter company at the relevant time, unless their complicity is duly pleaded and prima facie proved in terms of section 141 of the N.I. Act and not otherwise. The trial Magistrate has completely ignored all these vital aspects of the matter with impunity, while summoning the petitioners-accused

(2) 2010(3) R.C.R.(Crl.) 625
(3) (2011) 3 SCC 351

in a very casual manner. The trial Court ought to have discussed the material on record specifically, relatable to their complicity in view of the statutory provisions of section 141 of the N.I. Act and then to record the valid grounds for forming an opinion that there is prima facie material on record to summon them as accused for the pointed offence. Such order must be informed by reasons, fair, clear and must be structured by rational, relevant material on record and should match the legal statutory requirement (essential ingredients) of the offence, which are miserably lacking in the instant cases in this relevant connection.

(15) What cannot possibly be disputed here is that the criminal prosecution is a serious matter; it affects the liberty of a person. No greater damage can be done to the reputation of a person than dragging him in a criminal case. Criminal law cannot possibly be set into motion as a matter of course. 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 complaint and the evidence both oral and documentary in support thereof, relatable to the relevant provisions of the offences and that would 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 preliminary evidence. The accused cannot be summoned in a routine manner, in view of the law laid down by the Hon'ble Apex Court in cases ***M/s Pepsi Foods Limited*** versus ***Special Judicial Magistrate (4),*** and **Harshendra Kumar D (supra).** The ratio of law laid down in the aforesaid judgments "mutatis mutandis" is applicable to the facts of the present cases and is the complete answer to the problem in hand.

(16) Therefore, the impugned summoning orders are not only non-speaking, lack application of mind & illegal, but against the indicated statutory provisions as well. The same cannot be sustained in the eyes of law and deserve to be quashed in the obtaining circumstances of the cases.

(17) In the light of aforesaid reasons and without commenting further anything on merits, lest it may prejudice the case of either side during the course of subsequent trials of the complaints, the instant petitions are partly accepted. Consequently, the impugned summoning orders are hereby quashed. The cases are remitted back to the trial Magistrate to decide the

(4) 1997(4) RCR (Crl.) 761 : 1998 AIR SC 129

matter afresh and to pass the appropriate orders in view of aforesaid observations and in accordance with law.

(18) The complainants through their counsel are directed to appear before the trial Court on 28.05.2013 for further proceedings.

Needless to mention that, nothing recorded here-in-above, would reflect, in any manner, on the merits of the complaints, as the same has been so observed for a limited purpose of deciding the present petitions only.

A. Jain

Before Ajay Tewari, J.

SHASHI BALA AND OTHERS—*Petitioners*

versus

STATE OF PUNJAB AND OTHERS—*Respondents*

CWP No. 12085 of 2008

July 12, 2012

Constitution of India, 1950 - Art. 226 & 227 - Punjab State Assistant Grade Examination Rules, 1984 - Rl. 4 - Punjab Civil Secretariat (State Service Class III) Rules, 1976 - Rl. 10(2) - Seniority - Principle of catch up - Rules amended retrospectively - Amended Rule provided seniority in accordance with his seniority in the appointment from which he has been promoted as Assistant, if person qualifies test within first two chances available to him after appointment to such post - Amendment also provided that if person who qualifies fails to qualify within the aforesaid two chances, he would be assigned seniority from the day he is promoted as such - Subsequently number of chances increased - More persons qualified and promoted as Assistants - Petitioners were granted seniority from the date of promotion but subsequently assigned lower seniority on the premise that private respondents would catch up with the petitioners - Challenge on the ground that persons who had been promoted consequent to the first two tests would remain immune from any catch up, as on the date when they were promoted, the other