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## **LIABILITY OF DIRECTOR UNDER NI ACT**

- MAHI YADAV<sup>1</sup> & YATHARTH GUPTA<sup>2</sup>

### **INTRODUCTION**

The Negotiable Instruments Act, 1881 (hereinafter referred as **NI Act**) is the safety net for those creditors (deemed or actual) who face difficulties in recovering defaulted amount, on account of debt or any other liability. Section 138 of the NI Act prescribes criminal liability onto such defaulter on account of dishonourment of cheque(s) which includes imprisonment for a maximum period of 2 years or fine upto twice the amount of cheque. Hence, the dishonourment of cheque is a criminal offence triable by learned Magistrate's Court having appropriate jurisdiction. However, in case of a corporate defaulter the criminal liability cannot be thrust upon such principal defaulter, due to the legal fiction of "juristic person". Thereby, Section 141 of NI Act rescues creditors as the criminal liability for default is put upon every person who at the time of commission of the offence was "in-charge" and responsible for "conduct of the business". The present article delves the jurisprudential aspect and the extent liability of the director under Section 141 of the NI Act, and analyzing the decisions of the Hon'ble Court in this regard.

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## **BRIEF SUMMARY OF STATUTORY PROVISIONS**

The cardinal provision which establishes the criminal liability upon the defaulter for dishonorment of cheque is Section 138 of the NI Act, however, the provision provides both civil as well as criminal liability, onto such defaulter who has drawn an unpaid cheque. The provision describes dishonorment of cheque as an offence for which the offender may be punished either for an imprisonment of upto 2 years or fine of not more than twice the amount of cheque or both. The provision also prescribes a pre-litigation procedure which entails a mandatory demand notice send to by the aggrieved person to the defaulter and if the defaulter fails to honor the demand notice as well, the aggrieved person shall proceed with lodging a complaint before the competent learned Court for trial and adjudication.

The Act under Section 141 provides liability of a juristic person, whereby the offence of default has been committed by a company or a limited liability partnership or partnership firm or any other form of association of individuals (hereinafter referred as **Director**). As Section 141, the offender is both the juristic person as well as the persons responsible to the management of the affairs of such juristic person. The person responsible may be holding position of any director, manager, secretary or other officer of the defaulted juristic person. Thereby, such natural offenders holding posts of responsibility in defaulted juristic person may be punished by the learned Court in accordance of punishments provided under Section 138.

## **JURISPRUDENTIAL RATIONALE OF VICARIOUS LIABILITY OF DIRECTOR UNDER SECTION 141 NI ACT**

The principle of vicarious liability evolved from the general principles of tort whereby a person is responsible for the actions of other person, due to nature of relationship between such persons,

such as employer-employee. In the present context, presence of relationship between the juristic person and the natural persons such as Director, establishes the criminal liability of the Director for the offence of the juristic person vicariously and thereby all such Director or any other person responsible for the illicit actions due to negligence or knowledge can be punished under the respective legislations.

Recently, the Hon'ble Supreme Court in its judgment of *Dilip Hariramani v. Bank of Baroda*<sup>3</sup> evaluated the aspect of vicarious liability of the Director for an offence under Section 138 read with Section 141 of NI Act. In this matter, the bank extended a loan and cash credit facility to the partnership firm and as a part repayment, the cheques were issued by the authorized signatory of the firm which was dishonoured due to insufficient funds. During the trial proceeding before the learned Magistrate, the partnership firm was not made an offender/accused, however, the partners were named as accused as partners of the firm. The learned Magistrate convicted the partners. The partners preferred an appeal before the first appellate court i.e. learned Sessions Court and the Hon'ble High Court, however, both appeals were dismissed.

The Hon'ble Court examined the scheme of provision of Section 141 and held as follows:-

7. *...Sub-section (1) to Section 141 of the NI Act states that where a company commits an offence, 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, as well as the company itself, shall be deemed to be guilty of the offence. The expression 'every person' is wide and comprehensive enough to include a director, partner or other officers or persons. At the same time, it follows that a person who does not bear out the requirements of 'in charge of and responsible to the company for the conduct of its business' is not vicariously liable under Section 141 of the NI Act. The burden is on the prosecution to show that the person prosecuted was in charge of and responsible to the company for conduct of its business. The proviso, which is in the nature of an exception, states that a person liable under subsection (1) shall not be punished if he proves that the offence was*

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<sup>3</sup> Criminal Appeal No. 767/2022, decided on 09.05.2022

*committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence. The onus to satisfy the requirements and take benefit of the proviso is on the accused. Still, it does not displace or extricate the initial onus and burden on the prosecution to first establish the requirements of sub-section (1) to Section 141 of the NI Act. The proviso gives immunity to a person who is otherwise vicariously liable under sub-section (1) to Section 141 of the NI Act.*

8. *Sub-section (2) to Section 141 of the NI Act states that notwithstanding anything contained in sub-section (1), where a company has committed any offence under the Act, and it is proved that such an offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officers of the company, then such director, manager, secretary or other officers of the company shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Sub-section (2) to Section 141 of the NI Act does not state that the persons enumerated, which can include an officer of the company, can be prosecuted and punished merely because of their status or position as a director, manager, secretary or any other officer, unless the offence in question was committed with their consent or connivance or is attributable to any neglect on their part. The onus under sub-section (2) to Section 141 of the NI Act is on the prosecution and not on the person being prosecuted."*

The corporate person is a juristic person in nature which has been created by legal fiction and does not have any physical existence. Such juristic or legal persons have been created by incorporated under various legislations including Companies Act, Partnership Act, LLP Act etc. The mind and actions of the juristic persons are attributable to the natural persons who govern and manage the affairs as well as the business of such legal persons. Thereby, Section 141 provides that on account of illicit and unlawful actions of the juristic person, criminal liability can be pinned on the natural persons who have overall control of the day-to-day business of the company or firm by virtue of vicariously liable for the actions of the juristic person, as held by the Hon'ble Supreme Court in *Dilip Hariramani* (*supra*). The principle of piercing of corporate veil is often used to ascertain the criminal liability under Companies Act.

Resultantly, the aforementioned deem fiction has been created by the legislation to punish the actual culprit who has illicitly used the company as a medium to commit the offence of dishonourment of cheque and needs to be punished as per Section 138 of NI Act.

### **SCOPE OF LIABILITY UNDER SECTION 141**

The Hon'ble Court while ascertaining the meaning and scope of the Section 141 with respect of the liability of Director, held that the liability under sub-section (1) of Section 141 may be pinned on a person who is in control of the day-to-day business of the company<sup>4</sup> whereas under sub-section (2) of Section 141 defines the deemed liability by fiction of person holding prescribed posts under the provision i.e. director, manager, secretary or other officer of the company.

The first proviso under sub-section (1) of Section 141 provides immunity from the criminal liability to the persons for the offence of the companies on account of acting diligently. In such scenario, the onus of proof shall be on such accused person. The second proviso under sub-section (1) of Section 141 provides complete immunity to the nominated director.

The Hon'ble Supreme Court in *Dilip Hariramani* (*supra*) heavily relied on its earlier judgment of *Aneeta Hada v. Godfather Travels and Tours Private Ltd.*<sup>5</sup> held that the complaint should essentially satisfy one of the twin requirements of Section 141 to establish the vicarious criminal liability and by deeming fiction such persons can be pinned to liability and then punishment. Further, the Hon'ble Court held that unless the company has been held as a principal accused in the matter till then the fiction cannot be complete and such an error can vitiate the entire proceeding before the learned Court.

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<sup>4</sup> *Girdhari Lal Gupta v. D.H. Mehta*, (1971) 3 SCC 189.

<sup>5</sup> (2012) 5 SCC 661

## **LIABILITY OF NON-SIGNATORY DIRECTOR**

The aforesaid question is no more *res integra* as the settled by the Hon'ble Supreme Court in *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla*<sup>6</sup>, wherein it was held that it is necessary to aver in the complaint that the person named as accused was responsible for the conduct of the business of the company at the time of commission of the offence. Also, the person holding a post of director cannot be deemed to be in-charge of and responsible for the conduct of the business, hence, specific averment showcasing that the person was managing the affairs of the company at that relevant time is quintessential.

The Hon'ble whilst reiterating the aforesaid principle in *Ashutosh Ashok Parasrampuriya v. M/s. Gharrkul Industries Pvt. Ltd.*<sup>7</sup> held that in regard to the non-signatory Directors, specific averment in the complaint are necessary to persuade the learned Magistrate to issue process against such accused Director vicariously for the actions of the company.

## **CONCLUSION**

In light of the above mentioned statutory provisions and *ratio decidendi* of the Hon'ble Supreme Court, the issue regarding the scope and ambit of Section 141 of NI Act has been well-defined whereby the persons who are responsible for the conduct and affairs of the business or are holding position such as director, managers, secretary etc can be held vicariously criminal liable for the dishonourment of cheque of the company.

The complainant while preferring a trial essentially and necessarily provides specific averment which establishes that the person was managing the day-to-day affairs of the company and also,

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<sup>6</sup> 2005 (8) SCC 89

<sup>7</sup> 2021 SCC Online SC 915

the company must be named as principal accused to establish legal fiction of vicarious criminal liability. Thenceforth, it is necessary to note while filing a complaint under the NI Act for adequate redressal and adjudication.

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<sup>8</sup> Majesty legal is law firm, established by Mahi Yadav and aim of the present article is to provide insights on the recent legal development. The opinions presented in the article are personal in nature and not to be deemed as legal advice.