

**DISHONOUR OF CHEQUE: VICARIOUS LIABILITY OF DIRECTORS  
OF THE COMPANY UNDER SECTION 141 OF NEGOTIABLE  
INSTRUMENTS ACT, 1881**

**A STUDY CIRCLE PRESENTATION**

**AT**


**SESSIONS DIVISION KURUKSHETRA**

**ON**

**23.01.2020**

**BY:-**

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**Dishonour of Cheque: Vicarious Liability of Directors of the Company under  
Section 141 of Negotiable Instruments Act, 1881.**

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**ABSTRACT:**

Section 141 of Negotiable Instruments Act, 1881 states that if the person committing an offence under Section 138 of the said Act is a company, every director of such company who was in charge of and responsible to that company for conduct of its business shall also be deemed to be guilty. The reason for creating vicarious liability is plainly that a juristic entity i.e. a company would be run by living persons who are in charge of its affairs and who guide the actions of that company and that if such juristic entity is guilty, those who were so responsible for its affairs and who guided actions of such juristic entity must be held responsible and ought to be proceeded against. Thus, the object of the said provision is *to lift the corporate veil* and to fix the vicarious liability of the living persons who are in charge of the affairs of the company and who are responsible for the conduct of its business.

## **INTRODUCTION:**

Section 141 of the Negotiable Instruments Act, 1881 caters the situation where the person committing an offence under Section 138 of the said Act is a company. It provides that besides the company, 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 of the company shall also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Thus, this provision creates vicarious liability of the persons who were in charge of and responsible to the company for the conduct of its business at the time of the commission of said offence.

Indisputably, in such a case, the company is the principal offender. Further, 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. Similarly, 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 of said Act. The question arises when any other director of the company has been impleaded as an accused by the complainant in the complaint.

#### **VICARIOUS LIABILITY OF DIRECTOR:**

In the case titled as **S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and another, Law Finder Doc Id # 85644, Date of Decision 20.09.2005, 3 Judges Bench, the Hon'ble Supreme Court of India** held as under:

“21. In view of the above discussion, our answers to the questions posed in the Reference are as under:

(a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b) The answer to question posed in sub-para (b) has to be in negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for conduct of its business. The requirement of Section 141 is that 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.

(c) The answer to question (c) has to be in affirmative. The question notes that the Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as Managing Director or Joint Managing Director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141."

Hence, 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. 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. Vicarious liability on the part of a person must be pleaded and proved and not inferred. 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.

#### **IS MERE STATEMENT IN THE COMPLAINT SUFFICIENT?**

Now, the important question that arises is that whether a mere statement in the complaint that the director, who has been arrayed as an accused in the complaint, 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, is sufficient for the summoning of such director as an accused or not?

This issue was dealt with, in detail, by the Hon'ble Supreme Court of India in the case titled as **Gunmala Sales Private Ltd. v. Anu Mehta and others,** **Law Finder Doc Id # 628127, Date of Decision 17.10.2014.** In the said case, after considering all the previous relevant judgments of the Hon'ble Supreme Court passed on this issue, including the cases SMS Pharma (I), KK Ahuja and National

Small Industries Limited, the Hon'ble Supreme Court of India held that so far as the directors who are not signatory to the cheques or who are not managing directors or joint managing directors are concerned, it is clear from the conclusions drawn in the previous cases that it is necessary to cover in the complaint filed under Section 138 of the Negotiable Instruments Act that at the relevant time when the offence was committed, such directors were in charge of and were responsible for the conduct of the business of the company. This is a basic requirement. There is no deemed liability of such directors. Regarding the above posed question, the Para Nos. 28, 29 and 30 of the said judgment are very much relevant, so much so that they are the crux on said issue.

**In the above mentioned paragraphs, the Hon'ble Supreme Court of India held as under:**

“28. SMS Pharma-(1), undoubtedly, says that it is necessary to specifically aver in the complaint that the Director was in charge of and responsible for the conduct of the company's business at the relevant time when the offence was committed. It says that this is a basic requirement. And as we have already noted, this averment is for the purpose of persuading the Magistrate to issue process. If we revisit SMS Pharma-(1), we find that after referring to the various provisions of the Companies Act it is observed that those provisions show that what a Board of Directors is empowered to do in relation to a particular company depends upon the roles and functions assigned to



Directors as per the memorandum and articles of association of the company. There is nothing which suggests that simply by being a Director in a company, one is supposed to discharge particular functions on behalf of a company. As a Director he may be attending meetings of the Board of Directors of the company where usually they decide policy matters and guide the course of business of a company. It may be that a Board of Directors may appoint sub-committees consisting of one or two Directors out of the Board of the company who may be made responsible for the day-to-day functions of the company. This Court further observed that what emerges from this is that the role of a Director in a company is a question of fact depending on the peculiar facts in each case and that there is no universal rule that a Director of a company is in charge of its everyday affairs. What follows from this is that it cannot be concluded from SMS Pharma-(1) that the basic requirement stated therein is sufficient in all cases and whenever such an averment is there, the High Court must dismiss the petition filed praying for quashing the process. It must be remembered that the core of a criminal case are its facts and in factual matters there are no fixed formulae required to be followed by a court unless it is dealing with an entirely procedural matter. We do not want to discuss 'the doctrine of Indoor Management' on which submissions have been advanced. Suffice it to say, that just as the complainant is entitled to presume in view of provisions of the Companies Act that the Director was concerned with the issuance of the cheque, the Director is entitled to contend that he was not concerned with the issuance of cheque for a variety of reasons. It is for the High Court to consider these submissions. The High Court may in a given case on an overall

reading of a complaint and having come across some unimpeachable evidence or glaring circumstances come to a conclusion that the petition deserves to be allowed despite the presence of the basic averment. That is the reason why in some cases, after referring to SMS Pharma-(1), but considering overall circumstances of the case, this Court has found that the basic averment was insufficient, that something more was needed and has quashed the complaint.

29. When a petition is filed for quashing the process, in a given case, on an overall reading of the complaint, the High Court may find that the basic averment is sufficient, that it makes out a case against the Director; that there is nothing to suggest that the substratum of the allegation against the Director is destroyed rendering the basic averment insufficient and that since offence is made out against him, his further role can be brought out in the trial. In another case, the High Court may quash the complaint despite the basic averment. It may come across some unimpeachable evidence or acceptable circumstances which may in its opinion lead to a conclusion that the Director could never have been in charge of and responsible for the conduct of the business of the company at the relevant time and therefore making him stand the trial would be abuse of the process of court as no offence is made out against him.

30. When in view of the basic averment process is issued the complaint must proceed against the Directors. But, if any Director wants the process to be quashed by filing a petition under section 482 of the Code on the ground that only a bald averment is made in the complaint and that he is really not concerned with the issuance of the

cheque, he must in order to persuade the High Court to quash the process either furnish some sterling uncontrovertible material or acceptable circumstances to substantiate his contention. He must make out a case that making him stand the trial would be abuse of the process of court. He cannot get the complaint quashed merely on the ground that apart from the basic averment no particulars are given in the complaint about his role, because ordinarily the basic averment would be sufficient to send him to trial and it could be argued that his further role could be brought out in the trial. Quashing of a complaint is a serious matter. Complaint cannot be quashed for the asking. For quashing of a complaint it must be shown that no offence is made out at all against the Director.”

Hence, it can be concluded that if in the complaint filed under Section 138 of the Negotiable Instruments Act, the basic averment has been made by the complainant that the director in question was in charge of and responsible for the conduct of the business of the company at the relevant time when the offence was committed, the magistrate can issue process against such director. There is no legal necessity on the part of the complainant to explain in so many words that how such director was involved in the conduct of the business of the said company at the relevant time. But, if a petition is filed under Section 482 of Code of Criminal Procedure by any such director, before the Hon’ble High Court, for quashing of such complaint, the Hon’ble High Court may, in the facts of a particular case, on an overall reading of the complaint, refuse to quash the complaint because the

complaint contains the basic averment which is sufficient to make out a case against the director. Whereas, in the facts of a given case, on an overall reading of the complaint, the High Court may, despite the presence of the basic averment, may quash the complaint because of the absence of more particulars about the role of the director in the complaint.

In other words, if the basic averment has been made by the complainant in the complaint that the director in question was in-charge of and responsible for the conduct of the business of the company at the time when the offence was committed, such director can be summoned by the Magistrate concerned. Now, if such director files a petition before the Hon'ble High Court for quashing of such complaint, he cannot get it quashed only on the ground that only a bald averment is made in the complaint and that he is really not concerned with the issuance of the cheque. To get such complaint quashed under Section 482 of CrPC, such director has to put some unimpeachable, un-controvertible evidence before the Hon'ble High Court which is beyond suspicion or doubt or totally acceptable circumstances which may clearly indicate that the director could not have been concerned with the issuance of cheque and asking him to stand trial would be abuse of the process of the court. In such a case, despite the presence of the basic averment, the Hon'ble High Court may come to a conclusion that no case is made out against the director. In the said judgment, the Hon'ble Supreme Court

also cited an example to elucidate the matter further. The Hon'ble Supreme Court stated that take for instance, a case of a director suffering from a terminal illness who was bedridden at the relevant time or a director who had resigned long before the issuance of cheque. In such cases, if the High Court is convinced that prosecuting such a director is merely an arm-twisting tactics, the Hon'ble High Court may quash the proceedings, even if the basic averment has been made by the complainant in his complaint. At the cost of repetition, it is pertinent to mention here that to establish such case, unimpeachable evidence which is beyond suspicion of doubt or some totally acceptable circumstances will have to be brought to the notice of the High Court by such director. In the absence of such evidence or circumstances, the complaint cannot be quashed. That is the reason why in some cases, after referring to SMS Pharma (1), but considering overall circumstances of the case, the Hon'ble Supreme Court has found that the basic averment was insufficient, that something more was needed and has quashed the complaints.

Further, it is important to refer here Section 149 (12) of the Companies Act, 2013 which provides to the effect:-

“149. Company to have Board of Directors:-

.....

.....

(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 or 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 has not acted diligently.

.....?.

**COMPLAINT IS NOT MAINTAINABLE WITHOUT MAKING 'COMPANY' A PARTY:**

In the case titled as **Aneeta Hada v. Godfather Travels and Tours Private Limited, 2012(2) R.C.R. (Criminal) 854, a three-Judges Bench decision, the Hon'ble Supreme Court of India held** that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. It has been further held therein that there cannot be any vicarious liability unless there is a prosecution against the company. It is pertinent to mention here that vide the said judgment, the Hon'ble Supreme Court of India overruled its judgment in the case titled as **Anil Hada v. Indian Acrylic Ltd., 2000 (1) R.C.R. (Criminal)1.** The Hon'ble Supreme Court further held that the decision in Anil

Hada (supra) has to be treated as not laying down the correct law as far as it states that the director or any other officer can be prosecuted without impleadment of the company as an accused.

**NOTICE TO EACH DIRECTOR NOT REQUIRED:**

In the case titled as **Sunita Jain v. M/s. Kay Jain Processors (P&H), 2019 (4) R.C.R. (Criminal) 972, the Hon'ble High Court of Punjab and Haryana** held that the drawer of the cheque in case of a company is the company itself, and therefore, the requirement of the Act is to issue notice to the drawer of the cheque i.e. the company, and not to anyone else who are to be made vicariously liable. There is no provision in Section 141 of the said Act making it mandatory to issue individual notices to all the persons who are to be made vicariously liable. The persons who are being made vicariously liable are arrayed as accused on the strength of Section 141 of the said Act. Once a notice has been issued to the company, there is sufficient compliance of requirements of the statute.

**SUBMISSION OF FORM-32 IN EACH CASE IS NOT MANDATORY:**

In the case titled as **Anil Chanana and another v. M/s. Gyani Ram Ruliya Ram and another, 2019 (2) Civil Court Cases 238, the Hon'ble High Court of Punjab and Haryana** has insisted upon the production of Form-32 and annual return filed by the company in order to determine the persons who were

directors on the date of commission of the offence. But, in the case Sunita Jain v. M/s. Kay Jain Processors (P&H) (supra), the Hon'ble High Court of Punjab and Haryana clarified that such directions cannot be interpreted to mean that all the summoning orders are liable to be quashed only because Form-32 has not been filed by the complainant along with the complaint. If the complainant has filed the annual return of the company or any other relevant document in the preliminary evidence to determine the persons who were directors of the company on the date of the commission of the offence, then it will suffice. The Hon'ble High Court further held that such directions have been issued only to ensure that in future, before summoning an accused, the court must prima facie satisfy itself as to whether the person sought to be summoned is or is not director of the company.

#### REFERENCES:

1. S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and another, Law Finder Doc Id # 85644, Date of Decision 20.09.2005, 3 Judges Bench.
2. Gunmala Sales Private Ltd. v. Anu Mehta and others, Law Finder Doc Id # 628127, Date of Decision 17.10.2014.
3. Aneeta Hada v. Godfather Travels and Tours Private Limited, 2012(2) R.C.R. (Criminal) 854, a three-Judges Bench decision.
4. Anil Hada v. Indian Acrylic Ltd., 2000 (1) R.C.R. (Criminal) 1.
5. Sunita Jain v. M/s. Kay Jain Processors (P&H), 2019 (4) R.C.R. (Criminal) 972.



6. Anil Chanana and another v. M/s. Gyani Ram Ruliya Ram and another, 2019  
(2) Civil Court Cases 238.