NEGOTIABLE INSTRUMENTS ACT, 1881 – CRIMINAL LIABILITY OF COMPANIES FOR OFFENCE COMMITTED UNDER SECTION 138 – 141 OF THE ACT

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ABSTRACT
This paper attempts to delineate the criminal liability of companies for offence committed by corporate bodies under section 138 – 141 of the Negotiable Instrument Act. The company and all the people responsible for the affairs of the company will be liable to be prosecuted against and punished. As the company is having a separate legal entity, it is not immune to the punishment and fine for offence committed under section 138 of the N.I. Act. The vicarious liability would cast on three category of persons viz: the company itself, every person who was in charge of the affairs of the company, and other persons like director, or a manager, or a secretary, or other officer of the company. To get clarity on the point of law, relevant territorial jurisdiction for filing a complaint, various decisions of the courts is discussed in this study.

Key words: Company, Every Person, Dishonour of Cheque, Offence, Negotiable Instruments.

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1. INTRODUCTION
Indian Banks Association, in a Public Interest Litigation suit filed before the Supreme Court of India, has alleged that around eighteen lakh cheque bouncing cases are pending in various courts and prayed for establishing special courts for summary disposal of such cases. While bringing an ordinance to amend the N.I. Act, in June 2015, the Government has claimed that around eighteen lakh cheque bouncing cases were pending in Indian courts due to the question of jurisdiction to try such cases. Cheque bouncing becomes an economic cancer affecting the credibility of Merchant community. To put more teeth in the implementation of cheque bouncing cases the Government of India introduced the Negotiable Instruments (Amendment & Miscellaneous Provisions) Act, 2002. This Act amended sections 138, 141 and 142 of the Act.

The penal provisions for offence committed are provided under sections 138 - 141 of Negotiable Instruments Act 1881 – a research study is undertaken analysing interpretation of the relevant provisions in the Supreme Court and High Courts judgments. A cheque is considered dishonoured when the payment was not made on presentation, by the drawee bank due to insufficient funds to
honour the cheque or the amount payable exceeds the amount arranged to be paid. The penal provisions in case of dishonour of cheques and the implication among the trading community in India and how far such provisions are essential to protect the morale, faith and confidence in business dealings, both domestically and internationally, are analysed in this study.

1. Companies are not immune to criminal liability for offence committed for dishonour of cheques, under the provisions of Negotiable Instruments Act 1881. (Herein after mentioned as N.I.Act.)

2. “Company” is defined under section 2(20) of the Companies Act 2013 as follows:
   “Company” means a company incorporated under this Act or under any previous company law.” Under this section, a company is a body corporate and includes a firm or other association of individuals.

3. The word “person” is defined in section 2(42) of General Clauses Act 1897 as follows:
   “Person shall include any company or association or body of individuals, whether incorporated or not.

4. A company is a juristic person and a legal entity, but it is not a living person, it has no soul, mind or body. The company carries its day to day business, through living persons viz. Directors, Secretary, Manager, Officers, etc.,

5. When a company committed an offence warranting the application of the provisions of section 138 and 141 of the N.I. Act, it is necessary to determine who is the person responsible to the company for the conduct of its business, and who could be said to have been in-charge thereof. For this purpose, an analysis of the provisions of section 141 of the N.I. Act is necessary. It reads as follows:

   “If the person committing an offence under section 138 is a company, every person who, at the time of the offence committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be prosecuted and punished accordingly: “Provided that nothing contained in the 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.

   If the person who committed the offence, as contemplated in section 138 of the N.I. Act was a company, under the deeming provisions of section 141, vicarious liability would cast on three categories of persons viz. (i) the company itself, which committed the offence, (ii) everyone who was in charge of and was responsible to the company for conduct of the business, and (iii) any other person who was a Director, or Manager, or Secretary, or other Officers of the company with whose knowledge or connivance or due to his negligence, the company has committed the offence.

6. Section 141 of N.I. Act contains conditions, which have to be satisfied before the vicarious liability can be extended to Officers of a company. Since the provision creates criminal liability, all the conditions cumulatively have to be scrupulously complied with. The conditions are intended to ensure that a person who is sought to be made vicariously liable for an offence of which the principal accused was the company, had a role to play in relation to the incriminating act and further that such a person should have known what was attributed to him to make him liable.

7. Directors, who resigned much earlier to the offence committed by the Company, are not exposed to vicarious liability for dishonour of cheque issued by the Company. In this case, one of the directors has resigned from the post on 02.03.2004 and sent the letter of resignation to the Managing Director of the company. The Board of directors of the company accepted the director’s resignation at the meeting held on 04.03.2004. The resignation of the director was also informed to the Registrar of Companies. Subsequently the company had issued 18 cheques on 30.04.2014 drawn on UTI Bank Ltd, Jeyanagar, and Bangalore in favour of different persons. All these 18 cheques were dishonoured by the banks on presentation. In the month of December, 2004, the payees of dishonoured cheques made 18 complaints u/s 138 of Negotiable Instruments Act. In the said complaints, the name of the former director who had resigned from the company much earlier to the date on which the 18 cheques were issued, was also included as an accused for the dishonour of cheques. The Hon’ble Supreme Court has held that the complaint against the former director who had resigned from the company much

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earlier to the date on which the offence under section 138 of N.I. Act was committed, was illegal and not sustainable. Harshendra Kumar v. Rebatilata Koley 162 Comp.Cases 247 S.C.

8. Where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or State Government, as the case may be, he shall not be liable for prosecution for offence committed under this provisions. - Proviso to section 141 of the Act - Inserted by Act 55 of 2002 w.e.f.06.02.2003.

9. Merely being a director in a company could not make him liable for the offence that has been committed by the company, for launching a prosecution against the director u/s 138 of N.I Act, there should be specific allegation in the complaint in regard to the part played by the director in the transaction in question. Allegation in the complaint made u/s 138 N.I. Act must be clear, specific and unambiguous showing that the concerned director was in charge of and responsible for the day to day business of the company – Central Bank of India v. Asian Global Ltd. 163 CC 398 SC.

Judgments of the Hon’ble Supreme Court of India and Hon’ble High Courts

The following important judgments of the Hon’ble Supreme Court of India and Hon’ble High Courts will through more light on this subject.


Whether a company could be sentenced to undergo imprisonment for offence committed under section 138 N.I.Act.? The answer is NO.

The Hon’ble Supreme Court has held: “there is no dispute that a company is liable to be prosecuted and punished for criminal offences. Although there are earlier authorities to the effect that corporations cannot commit a crime, the generally accepted modern rule is that, except for such crimes, as a corporation is held incapable of committing by reason of the fact that they involve personal malicious intent, a corporation may be subject to indictment or other criminal process, although the criminal act is committed through its agents”.

“As the company cannot be sentenced to imprisonment, the court cannot impose punishment, but when imprisonment and fine is the prescribed punishment, the court can impose the punishment of fine which could be enforced against the company.


Who are the persons liable to be prosecuted for offence committed by a company under section 138 of N.I.Act?

The Hon’ble apex court held, “The key words which occur in the section are ‘every person’. These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words ‘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, as well as the company, shall be deemed to be guilty of the offence, etc.’ What is required is that the persons, who are sought to be made criminally liable under section 141 should be at the time the offence was committed, was in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, when the offence was committed will not be liable under the provision… Conversely, a person not holding any office or designation in a company may be liable if he satisfies the main requirement of being in charge of and responsible for conduct of business of a company at the relevant time. Liability depends on the role one plays in the affairs of a company and not on designation or status. …. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action.”

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• National Small Industries Corp.Ltd. v. Harmeet Singh Paintal [2010] 154 Comp Cas 313 (SC), the Hon'ble apex court held that (page 330) : (dt.15.02.2010)

“if the accused is not one of the persons who falls under the category of ‘persons who are responsible to the company for the conduct of the business of the company’ then merely by stating that ‘he was in charge of the business of the company’ or by stating that ‘he was in charge of the day – to – day management of the company’ or by stating that ‘he was in charge of, and was responsible to the company for the conduct of the business of the company’ cannot be made vicariously liable under section 141(1) of the Act. To put it clear that for making a person liable under section 141(2), the mechanical repetition of the requirements under section 141(1) will be of no assistance, but there should be necessary averments in the compliant as to how and in what manner the accused was guilty of consent and connivance or negligence and therefore, responsible under sub – section (2) of section 141 of the Act . . . (emphasize supplied)

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 responsible for the conduct of the business of the company.”


The Hon’ble Supreme Court in this case has held that the words “was in charge of, and was responsible to the company for the conduct of the business of the company” refers to a person who is in overall control of the day to day business of the company. The court pointed out that, though a person may be a director and, thus, belongs to the group of persons making the policy followed by the company; that a person may be a manager who is in charge of the business but may not be in overall charge of the business; and that a person may be an officer who may be in charge of only some part of the business... the words in section 141(1) of the Act need not be incorporated in a complaint as magic words. But, at the same time, the substance of the allegations read as a whole, should answer and fulfil the requirements of the ingredients of the said provision

• K.K.Ahuja v. V.K. Vora [2009] 152 Comp Cas 520(SC),(dt.06.07.2009), it was propounded that if a mere reproduction of the wording of section 141(1) in the compliant is sufficient to make a person liable to face prosecution, virtually every officer/employee of a company without exception could be impleaded as an accused by merely making an averment that at the time when the offence was committed he was in charge of and was responsible to the company for the conduct of the business of the company. This would mean that if a company had 100 branches and the cheque issued from one branch was dishonoured, the officers of all the 100 branches could be made accused by simply making an allegation that they were in charge of and were responsible to the company for the conduct of the business of the company. That would be an absurd thing and not intended under the Act. As the trauma, harassment and hardship of a criminal proceeding in such cases can be more serious than the ultimate punishment, it is not proper to subject all and sundry to be impleaded as accused in a complaint against a company, even when the requirements of section 138, read and section 141, are not fulfilled.

• In the most recent case of Aneeta Hada v. Godfather Travels and Tours P.Ltd. [2012] 172 Comp Cas 75(SC),(dt.27.04.2012), the question that arose was whether an authorised signatory of a company would be liable for prosecution under section 138 of the Negotiable Instruments Act, 1881, without the company being charged as an accused. The learned judge also took note of the maxim lex non cogitadimpossibilis and expressed thus : “True interpretation, in my opinion, of the said provision would be that a company has to be made an accused but applying the principle ‘lex non cogit ad imposibility’, i.e., if for some legal snag, the company cannot be proceeded against without obtaining sanction of a court of law or other authority, the trial as against the other accused may be proceeded against if the ingredients of section 138 as also section 141 are otherwise fulfilled. In such an event, it would not be a case where the company had not been made an accused but would be one where the company cannot be proceeded against due to existence of a legal bar. A distinction must be borne in mind between cases where a company had not been made an accused and the one where despite making it an accused, it cannot be proceeded against because of a legal bar.”

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10. “A criminal prosecution is neither recovery of money nor for enforcement of any security etc. Section 138 of the Negotiable Instruments Act, is a penal provision the commission of which offence entails a conviction and sentence on proof of the guilt in duly conducted criminal proceedings. Once the offence under section 138 is completed the prosecution proceedings can be initiated not for recovery of the amount covered by the cheque but for bringing the offender to penal liability.” B.S.I Ltd, vs. Gift Holdings Private Ltd, (2000) 2 SCC 737.

When Cognizance of Offence could be taken by Courts - Section 142.

11. For the criminal offence contemplated under section 138 of N.I. Act, cognizance by the court is not attracted immediately when the cheque was returned unpaid from the drawee bank. It is attracted only after (a) the payee or the holder in due course, makes a demand for payment of the said amount of money, by giving a notice in writing to the drawer of the cheque within thirty days of the receipt of information from the bank (b) the drawer of the cheque has failed to pay the amount within 15 days of the receipt of the notice and (c) the payee has filed a written complaint within one month from the date on which the cause of action arises viz. when the drawer of the cheque failed to make the payment of the cheque amount to the payee or holder of the cheque within 15 days of the receipt of the notice. Only on the completion of these ingredients the courts can take cognizance of the offence under section 138 of the N.I. Act.

12. Therefore it is evident that the commission of offence under section 138 of the N.I Act is deemed to have been committed when the cheque was dishonoured unpaid, but cognizance of the offence under section 142 of the N.I. Act, will be taken by the court to proceed with the prosecution, only after filing a written complaint by the payee or the holder in due course, after the drawer of the cheque failed to make the payment.

13. Criminal offence is defined under section 2(n) of the Cr. Procedure Code 1973:- it means any act or omission made punishable of any law for the time being in force. In other words, under the Cr. Procedure Code an act or omission is an offence if it is punishable by law.

14. But under section 142 of the N.I. Act courts cannot take cognizance of offence and proceed with prosecution, unless all the ingredients of the proviso to section 138 of the N.I. Act had been cumulatively complied with.

15. Further such complaint shall be made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138.

Whether notice under section 138 (b) demanding payment shall be sent to all Directors of the Company.

16. The next limb of the necessary ingredients to make vicarious liability and prosecute a Company and others responsible for an offence committed under section 138 of N.I. Act is the service of notice required under sub clause (b) of the proviso to section 138 of the N.I. Act.

17. Is it necessary that notice under section 138 (b) demanding payment should be sent to all directors/officers of the company.

18. The moot question is whether the notice demanding payment of the bounced cheque should be served on all the directors of the company in addition to the service of notice on the company? The answer is no. Unnecessary delay would cause, if service of the default notice on all the directors, is made compulsory. There may be number of directors in a Company. Each director may be residing in different parts of the country or even in different countries. All the directors cannot be held liable for the offence contemplated under section 138 of N.I. Act. It is also difficult for the complainant to know the whereabouts of every director of the Company. The Hon’ble Supreme Court has held that it is sufficient if the notice demanding payment of the amount, is served on the Company who is the main accused and not every individual director. Once the notice is served on the Company, the Directors of the Company would certainly get knowledge of

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2. SUGGESTIONS

Such discretion is to be read into the section so far as the juristic person is concerned. Of course, the court cannot exercise the same discretion as regards a natural person. Then the court would not be passing the sentence in accordance with law. As regards a company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the Legislature and we find no difficulty in construing the statute in such a way. We do not think that there is blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The corporate bodies, such as a firm or company undertake series of activities that affect the life, liberty and property of the citizens. Large scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial and socio-logical sectors that amenability of the corporation to a criminal law is essential to have peaceful society with stable economy.”

3. CONCLUSION

Under section 138–141 of the Negotiable Instrument Act, 1881 all persons connected with the company will become vicariously liable only after the Judicial Magistrate examined the averments made in the complaint and only after satisfying that the complaint falls within the clutches of sections 138 to 141 of the Negotiable Instrument Act 1881. Vicarious liability would cast on a person only when the offence was committed with the consent or participation or as a result of his negligence and not because he was a director or officer of the company.

REFERENCES