

Independent Director in Cheque Bouncing Case

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A. Introduction & Background

An Independent Director (as per section 149 of Companies Act, 2013) is a director other than a Managing Director or Whole-time Director or a Nominee Director. An Independent Director cannot be related to any of the directors or promoters or even key management personnel. He / she cannot even be employee or key management personnel. It seems logical to say that an Independent Director cannot, generally speaking, be a person “*who, at the time the offence (of cheque bouncing) was committed, was in charge of, and was responsible to the company for the conduct of the business of the company*” as is the requirement under section 141 of Negotiable Instruments Act, 1881 (NI Act).

Even though it should be clear and obvious that an Independent Director cannot be covered under section 141 of the NI Act, it is a practice for many lawyers and law firms that when they file a complaint of cheque bouncing under the NI Act against a company, they include the names of all directors (including independent directors) as accused. This is a wrong practice that causes much inconvenience to the concerned independent directors.

This research paper examines the legal defenses available to independent directors who are saddled with such cheque bouncing cases for no fault.

B. Steps After Receipt of Notice

As and when a cheque issued by a company bounces, the holder of cheque issues a notice to the company as well as to the directors of the company. If you are an Independent Director and you receive such a notice, you must not ignore it. Do not forward the notice to the company and think that the company’s officers (law department, company secretary etc.) will take care of it. If the notice is addressed to you in person, you must answer it personally.

The following extract from judgement of Honourable Supreme Court in the matter of S.P. Mani and Mohan Dairy vs. Dr. Snehalatha Elangovan¹ is most relevant:

44. We may also examine this appeal from a different angle. It is not in dispute, as noted above, that no reply was given by the respondent to the statutory notice served upon her by the appellant. In the proceedings of the present type, it is essential for the person to whom statutory notice is issued under Section 138 of the NI Act to give an appropriate reply. The person concerned is expected to clarify his or her stance. If the person concerned has some unimpeachable and incontrovertible material to establish that he or she has no role to play in the affairs of the company/firm, then such material should be highlighted in the reply to the notice as a foundation. If any such foundation is laid, the picture would be more clear before the eyes of the complainant. The complainant would come to know as to why the person to whom he has issued notice says that he is not responsible for the dishonour of the cheque. Had the respondent herein given appropriate reply highlighting whatever

¹ Criminal Appeal No. 1586 of 2022, decided on 16th September 2022; MANU/SC/1189/2022

she has sought to highlight before us then probably the complainant would have undertaken further enquiry and would have tried to find out what was the legal status of the firm on the date of the commission of the offence and what was the status of the respondent in the firm. The object of notice before the filing of the complaint is not just to give a chance to the drawer of the cheque to rectify his omission to make his stance clear so far as his liability under Section 138 of the NI Act is concerned.

45. Once the necessary averments are made in the statutory notice issued by the complainant in regard to the vicarious liability of the partners and upon receipt of such notice, if the partner keeps quiet and does not say anything in reply to the same, then the complainant has all the reasons to believe that what he has stated in the notice has been accepted by the noticee. In such circumstances what more is expected of the complainant to say in the complaint.

Your reply must state clearly and unambiguously the following facts (to the extent true):

- a) I am an Independent Director of the company.
- b) I am not in charge of the business of the company in any way whatsoever.

- c) I am not responsible to the company for the conduct of the business of the company in any whatsoever.
- d) I have not signed the cheque that has been returned unpaid.
- e) I have not been involved in any manner in the transactions between you and the company.
- f) There is no way that I can be deemed to be guilty as per the provisions of section 141 of the NI Act.
- g) It is wrong on your part to include me as one of the recipients of the notice issued by you under section 138 of the NI Act.

The reply should be sent to the sender of the notice by all means possible but necessarily by Registered Post or Speed Post Acknowledgement Due. The reply should be sent by you even if the company officers / directors / promoters assure you that the company is arranging to make the payment or that the company is negotiating with the party and will settle it soon.

C. Steps After Receipt of Summons

If you have received summons from a court, you must take it seriously. Find out and engage an advocate who specializes in trial court criminal matters. Do not engage a senior lawyer who is an expert of High Court or Supreme Court.

On the first hearing when you appear before the trial court magistrate, your advocate will file a bail application. You need to arrange for some surety / cash deposit to fulfill the bail conditions. There is no escape from this step. Do not try to delay appearing before the trial court. If the court issues a warrant, you will face a more difficult situation.

Immediately after the above step is completed, you should arrange to file a revision petition either before the Sessions Court or before the concerned High Court (both options are correct though it is preferable to go to the Sessions Court). At this stage you need to engage a different advocate. The one you engaged for trial court may not have the capabilities to take up the matter before the higher court. The key prayer in the petition will be to quash the summoning order issued by the trial court.

For the revision petition, it is important that you read carefully the complaint made to the trial court and look at the specific statements that relate to you personally. For example, the complaint might state “*Accused No. 3 is director of accused no. 1 and is in charge of and is responsible to the company for the conduct of the business of the company*”. It is necessary to deny and rebut the said statement (called “*averment*” in legal language). It is most important that your revision petition states clearly and emphatically that you are an Independent Director and are not in any way either in charge of or responsible to the company for the conduct of the business of the company. Support for this may come from all or some of the following documents:

- a) Copy of Reply to the Notice under section 138 NI Act sent by you
- b) Copy of Appointment Letter issued by the company to you appointing you as Independent Director
- c) Copy of Board Resolution / Resolution of meeting of members appointing you as Independent Director.
- d) Copy of DIR-12 (or Form 32) filed by the company with Registrar of Companies when you were appointed
- e) Copy of intimation to stock exchanges when you were appointed as Independent Director (applicable in case of listed companies)

Please ensure that all the above documents (to the extent available / applicable) are submitted along with the revision petition.

Legal support for the revision petition comes from the following extract from S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Anr.²

15. To sum up, there is almost unanimous judicial opinion that necessary averments

ought to be contained in a complaint before a persons can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a Company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That respondent tails within parameters of Section 141 has

² Supreme Court of India, Decided on 20th September 2005; MANU/SC/0622/2005

to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141 he would issue the process. We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial.

16. 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.

Key point in the above judgement is that the complainant must state specifically that the accused person is covered under section 141 of the NI Act based on facts. There is no presumption that a person just because he is a director gets covered under section 141 of the NI Act and can be held guilty.

Notably, there are two requirements under section 141 of the NI Act. The requirements are as follows:

- a) In charge of the business of the company
- b) Responsible to the company for the conduct of the business of the company

It is important that both of the above points are clearly mentioned by the complainant in the complaint made to the trial court. Often one or even both points will be missed out in the averments made in the complaint. If this has happened, this can be a ground for the revision petition. Support for this comes from the following judgement of Honourable Supreme Court in the matter of Ashok Shewakramani & Ors. vs. State of Andhra Pradesh & Anr.³

19. Section 141 is an exception to the normal rule that there cannot be any vicarious liability when it comes to a penal provision. The vicarious liability is attracted when the ingredients of sub-section 1 of Section 141 are satisfied. The Section provides that every person who at the time the offence was committed was in charge of, and was responsible to the Company for the conduct of business of the company, as well as the company shall be deemed to be guilty of the offence under Section 138 of the NI Act. In the light of sub-section 1 of Section 141, we have perused the averments made in the complaints subject matter of these three appeals. The allegation in paragraph 1 of the complaints is that the appellants are managing the company and are busy with day to day affairs of the company. It is further averred that they are also in charge of the company and are jointly and severally

³ Criminal Appeal No. 879 of 2023, Decided on 3rd August 2023; 2023 INSC 692

liable for the acts of the accused No.1 company. The requirement of sub-section 1 of Section 141 of the NI Act is something different and higher. Every person who is sought to be roped in by virtue of sub-section 1 of Section 141 NI Act must be a 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. Merely because somebody is managing the affairs of the company, *per se*, he does not become in charge of the conduct of the business of the company or the person responsible for the company for the conduct of the business of the company. For example, in a given case, a manager of a company may be managing the business of the company. Only on the ground that he is managing the business of the company, he cannot be roped in based on sub-section 1 of Section 141 of the NI Act. The second allegation in the complaint is that the appellants are busy with the day-to-day affairs of the company. This is hardly relevant in the context of sub-section 1 of Section 141 of the NI Act. The allegation that they are in charge of the company is neither here nor there and by no stretch of the imagination, on the basis of such averment, one cannot conclude that the

allegation of the second respondent is that the appellants were also responsible to the company for the conduct of the business. Only by saying that a person was in charge of the company at the time when the offence was committed is not sufficient to attract sub-section 1 of Section 141 of the NI Act. Sub-section 1 of Section 141 reads thus:

"141. Offences by companies.- (1) If the person committing an offence under section 138 is a 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, 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:

Provided 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:

[Provided further that 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 the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.]"

20 On a plain reading, it is apparent that the words "was in charge of" and "was responsible to the company for the conduct of the business of the company" cannot be read disjunctively and the same ought be read conjunctively in view of use of the word "and" in between.

It is worth mentioning here that Honourable Supreme Court has held repeatedly that merely reproducing the words of section 141 of the NI Act and making an averment is not sufficient to prosecute a person for the offence of cheque bouncing. The complainant must state clearly why and how he/she has come to the conclusion that the accused person ought to be considered as a person fulfilling the twin requirements of the section. The position was reconfirmed in a recent judgement of Honourable Supreme Court⁴ as follows:

12. It could thus clearly be seen that this Court has held that merely reproducing the words of the Section without a clear statement of fact as to how and in what manner a director of the company was responsible for the conduct of the business of the company, would not ipso facto make the director vicariously liable.

13. A similar view has previously been taken by this Court in the case of K.K. Ahuja v.

V.K. Vora and Anr. MANU/SC/1111/2009 : 2009:INSC:859 : (2009) 10 SCC 48.

14. In the case of State of NCT of Delhi through Prosecuting Officer, Insecticides, Government of NCT, Delhi v. Rajiv Khurana MANU/SC/0533/2010 : 2010:INSC:460 : (2010) 11 SCC 469, this Court reiterated the position thus:

⁴ Susela Padmavathy Amma Vs. Bharti Airtel Limited, Decided on 15th March 2024; MANU/SC/0202/2024

17. The ratio of all these cases is that the complainant is required to state in the complaint how a Director who is sought to be made an Accused, was in charge of the business of the company or responsible for the conduct of the company's business. Every Director need not be and is not in charge of the business of the company. If that is the position with regard to a Director, it is needless to emphasise that in the case of non-Director officers, it is all the more necessary to state what were his duties and responsibilities in the conduct of business of the company and how and in what manner he is responsible or liable.

15. In the case of Ashoke Mal Bafna (supra), this Court observed thus:

9. To fasten vicarious liability Under Section 141 of the Act on a person, the law is well settled by this Court in a catena of cases that the complainant should specifically show as to how and in what manner the Accused was responsible. Simply because a person is a Director of a defaulter Company, does not make him liable under the Act. Time and again, it has been asserted by this Court that only the person who was at the helm of affairs of the Company and in charge of and responsible for the conduct of the business at the time of commission of an offence will be liable for criminal action. (See Pooja Ravinder Devidasani v. State of Maharashtra [Pooja Ravinder Devidasani v. State of Maharashtra, MANU/SC/1177/2014 : 2014:INSC:880 : (2014) 16 SCC 1 : (2015) 3 SCC (Civ) 384: (2015) 3 SCC (Cri) 378: AIR 2015 SC 675].)

10. In other words, the law laid down by this Court is that for making a Director of a Company liable for the offences committed by the Company Under Section 141 of the Act, there must be specific averments against the Director showing as to how and in what manner the Director was responsible for the conduct of the business of the Company.

16. A similar view has been taken by this Court in the case of Lalankumar Singh and Ors. v. State of Maharashtra MANU/SC/1301/2022 : 2022:INSC:1061 to which one of us (B.R. Gavai, J.) was a party.

D. Conclusions and Recommendations

It is a bad practice to rope in all directors including independent directors as accused in case of bouncing of a cheque issued by a company. This practice goes on despite clear judgements of Honourable Supreme Court against it. It is necessary that independent directors take due precautions and legal defense when faced with such a situation.

21 May 2024

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