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DISHONOUR OF CHEQUES OF COMPANIES AND ISSUANCE OF NOTICE TO DIRECTORS : A CRITICAL STUDY

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In the case of dishonour of cheques issued by the company on the ground of "insufficiency of funds", section 138 of the Negotiable Instruments Act, 1881, is attracted, as it is an offence. Besides the company, under section 141(1) the persons in charge and responsible to the company shall be deemed to have committed the offence. Under section 141(2) even the person who are not stated to be in charge of and responsible to the company can also be prosecuted, if it is alleged and proved that the offence has been committed with the consent and connivance of or is attributed to, any neglect on the part of any of those persons prosecuted.

The question arises for consideration is whether the notice to the company is sufficient or it should be given to every director. In the event of notice not being sent to the directors, they could be proceeded against or not. In a case (*Krishna Texport and Capital Markets Ltd. v. Ila A. Agrawal* [2015] 190 Comp Cas 241 (SC)), where notices were not sent to directors responsible and the statutory notice was sent only to the company, the trial court magistrate convicted the company and acquitted the directors. In an appeal the Supreme Court had to deal with the question, whether individual notices to the directors are mandatorily required to be sent in order to proceed against the directors ?

In *B. Raman v. Shasun Chemicals and Drugs Ltd.*², it was held by the Madras High Court that statutory notice under section 138 of the Negotiable Instruments Act was required to be sent to every director and non-compliance with such mandatory requirement, they could not be proceeded against.

The reasoning of this ratio appears to be that the legal fiction created by section 141 of the Negotiable Instruments Act to make the directors who are responsible for the day to day affairs of the company, punishable under section 138, then it is necessary that they get an opportunity to rectify the mistake or clarify matters after service of notice. So, before making the complaint against the directors, notice must be served on them. Without service of notice, vicarious liability of the offence under section 138 of the Negotiable Instruments Act cannot be fixed upon them.

1. Dean & Principal, Bharati Vidyapeeth Deemed University, Pune.
2. [2006] Cri. LJ 4552 (Mad).

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In order to get the money back in terms of cheque amount from those persons who represent the company in order to avoid filing of the complaint against them. The drawee has to necessarily make a demand from the persons who are part and parcel of the drawer. Only when this attempt fails, cause of action under section 138 of the Negotiable Instruments Act, would arise to enable the drawee to approach the court within the stipulated time.

The drawee has to start the process by service of the notice on the persons who represent the company, (the drawer of the cheque).

The object of the notice has been stated thus (*Krishna Texport and Capital Markets Ltd. v. Ila A. Agrawal* [2015] 190 Comp Cas 241 (SC)) :

(i) It gives a clear chance to the drawer of the cheque to rectify his omission and also to protect an honest drawer ;

(ii) By sending a notice to the company as well as the persons in charge of and responsible for the conduct of the business of the company, he can make a demand, asking them to pay the amount ;

(iii) Reply to notices will make the persons responsible for payment more specifically clear, so that the drawer may proceed only against those who are responsible and drop others who are not liable.

In *N. K. Wahi v. Shekhar Singh* [2007] 137 Comp Cas 939 (SC), the statement in paragraphs 10 and 11 are relevant to bring out the actual cause of action.

Paragraph 10 in order to bring application of section 138 of the Negotiable Instruments Act, the complaint must show :

(a) The cheque was issued ;

(b) The same was presented ;

(c) The same was dishonoured on presentation ;

(d) A notice in terms of section 138 was served on the person sought to be made liable within (15) days from the date of receipt of notice.

Paragraph 11 section 141 of the Negotiable Instruments Act constitutes constructive liability of the directors of the company or other persons responsible for its conduct or the business of the company.

With regard to a firm the question arose whether the notice to the firm must also require notice to the individual partners ? In *Girish Chandra Pandey v. Kanhaiyalal Chandak*¹, the Calcutta High Court ruled, "if the firm failed to give the amount within the stipulated time after receipt of notice, each partner need not be served with a separate notice individually".

1. [1999] All MR (Cri.) Journal 3.

Further, it was held¹, that section 141 of the Negotiable Instruments Act does not require that each and every partner of the firm is required to be issued notice.

The reasoning in the cases referred to may also apply to the companies as well.

In *Krishna Texport and Capital Markets Ltd. v. Ila A. Agrawal* [2015] 190 Comp Cas 241 (SC), it was stated thus (page 251) :

"According to section 138, where any cheque drawn by a person on an account maintained by him is returned by the bank unpaid for reasons mentioned in the said section such person shall be deemed to have committed an offence."

Proviso to section 138 stipulated three conditions on the satisfaction of which the offence is said to be completed :

- (i) The payee to make a demand for payment by giving a notice in writing to the drawer of the cheque ;
- (ii) If the drawer of the cheque fails to make the said payment within (15) days of the receipt of the said notice ;
- (iii) No other person is contemplated in section 138.

The notice to the drawer gives the opportunity to make the payment and escape the penal consequences.

There is nothing in section 138 to suggest even remotely that issue of notice to anyone other than the drawer.

In regard to a company as the drawer of the cheque, section 141 states, that if the person committing the offence under section 138 is a company, every director of the company who was in charge and responsible to that company for conduct of its business shall also be deemed guilty. The reason for this vicarious liability is that a juristic entity, i.e., company would be run by living persons who are in charge of the affairs of a company and who guide the actions of that company and if such juristic person is guilty, those who are responsible for its affairs and guided actions of such entity must be held responsible and ought to be proceeded against (paragraph 14 of 190 Comp Cas).

The analysis of the ratio in *Krishna Texport and Capital Markets Ltd. v. Ila A. Agrawal* [2015] 190 Comp Cas 241 (SC), points out the following :

- (i) Section 141 of the Negotiable Instruments Act does not lay down that the directors must be individually issued notices under section 138 ;

1. *Jain Associates v. Deepak Chawdhary and Co.* [1999] 80 DLT 654 (Delhi). See also *K. Pannir Selvam v. M. M. T. C. Ltd.* [2000] 99 Comp Cas 94 (AP) and also *Ranjit Tiwari v. Narender Nayyar* [2012] 191 DLT 318 (Delhi).