

THE ROLE OF THE DIRECTORS OF COMPANIES UNDER CRIMINAL COMPLAINT UNDER SECTION 138 OF NEGOTIABLE INSTRUMENT ACT, 1881 :

The Hon'ble Supreme Court in the case of Gunmala Sales Pvt Ltd vs Anu Mehta and ors reported in 2015 (5) Mh.L.J. (S.C.) I = 2015 (3) Mh.L.J. (cri) (S.C.) 523 = (2015) 1 SCC 103, while explaining the ambit, scope and purport of section 138 and section 141 in para 34 held thus :

34- We may summarise our conclusions as follows :

34.1 Once in a complaint filed under section 138 read with section 141 of the NI Act the basic averment is made that the Director 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.

34.2 If a petition is filed under section 482 of the Code for quashing of such a complaint by the Director, the High Court may, in the facts of 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.

34.3. 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, quash the complaint because of the absence of more particulars about the role of the Director in the complaint. It may do so having come across some unimpeachable, incontrovertible evidence 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 cheques and asking him to stand the trial would be abuse of process of Court. Despite the presence of basic averment, it may come to a conclusion that no case is made out against the Director. 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 issuance of cheques. In such cases, if the High Court is convinced that prosecuting such a Director is merely an arm-twisting tactics, the High Court may quash the proceedings. It bears repetition to state that no establish such case unimpeachable, incontrovertible evidence which is beyond suspicion or doubt or some totally acceptable circumstances will have to be brought to the notice of the High Court. Such cases may be few and far between but the possibility of such a case being there cannot be ruled out. In the absence of such evidence or circumstances, complaint cannot be quashed.

34.4 No restriction can be placed on the High Court's powers under section 482 of the Code. The High Court always use and must use this power sparingly and with great circumspection to prevent inter alia the abuse of the process of the Court. There are no fixed formulae to be followed by the High Court in this circumstances of each case. The High Court at that stage does not conduct a mini trial or roving inquiry, but nothing prevents it from taking unimpeachable evidence or totally acceptable circumstances into account which may lead it to conclude that no trial is necessary qua a particular Director.

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The Supreme Court in the aforesaid judgment in para 34.2 has clearly held that on an over all reading of the complaint, the High Court can refuse to quash the complaint because the complaint contains the basic averments which is sufficient to make out a case against the Director.

The Supreme Court in the case of K.K. Ahuja Vs V.K. Vora and anr reported in 2009 Mh1J Online (Cri) (S.C.) 42= (2009) 10 SCC 48 in para 27 held as under :

27- The position under section 141 of the Act can be summarized thus-

- i. 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.
- ii. 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 allegations 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 subsection (2) of Section 141.
- iii. In the case of a Director, secretary or manager [as defined in Section 2 (24) of the Companies Act] or a person referred to in clause (e) and (f) of Section 5 of the Companies Act, an averment in the complaint that he was in charge of and was responsible to the company, for the conduct of the business of the company is necessary to bring the case under Section 141 (1) of the Act. No further averment would be necessary in the complaint, though some particulars will be desirable. They can also made liable under section 141 (2) by making necessary averments relating to consent and connivance or negligence, in the complaint, to bring the matter under that subsection.
- iv. Other officers of a company cannot be made liable under subsection (1) of Section 141. Other officers of a company can be made liable only under subsection (2) of Section 141, by averring in the complaint their position and duties in the company and their role in regard to the issue and dishonor of the Cheque disclosing consent, connivance or negligence.