



I-CUBE NEWSLETTER

WEDNESDAY, 30 OCTOBER



VICARIOUS LIABILITY OF DIRECTORS IN CRIMINAL OFFENCES – WHEN APPLICABLE

Liability of directors for criminal offences by companies are dealt differently when compared to civil offences. Any default of compliance of provisions under the Companies Act, 2013 will result in an “officer in default” (which includes managing directors, KMPs and directors, as the case may be) to be held responsible for such offence. Hence any non-compliance of a procedural statutory requirement to report or to file a document, information or a fact is dealt as a strict liability. There is no question of ascertainment of *mens rea* (guilty mind) or consideration of any other rhyme or reason to escape from prosecution or stringent action. No further explanation or reason or excuse will even be considered by the Court dealing with prosecution. Offences under the said Act for non-compliance of various provisions are primarily civil offences except a few specific provisions which are criminal in nature like Section 76A relating to default in respect of acceptance and repayment of deposits, Section 447 relating to fraud.

However, the position of law is completely different in matters relating to criminal offences. While a company is an artificial person, it is the Board of Directors and top management which are responsible for its day to day operations. Thus, the top management including the Board of Directors become the *alter ego* of the company. This means that by way of the **principle of attribution**, *mens rea* or the criminal intent or the guilty mind and the *actus reus* or the criminal acts of the *alter ego* i.e. the persons or group of persons in control of the affairs of the company and at the helm of its affairs, can be attributed to the company and the company can be prosecuted. This means attributing the will of the individuals who govern the company can be fastened on to the company to attract criminal liability of the corporate body.

In **Sunil Bharti Mittal v. Central Bureau of Investigation** [(2015) 4 SCC 609], the Hon'ble Supreme Court was faced with an opposite situation, where it had to examine as to : Whether the liability of the company can be attributed to the person(s) at the helm of the affairs of the company by invoking the principle of attribution?



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The Supreme Court answered a resounding 'No'. The Court reiterated that the criminal intent of the person(s) controlling company can be imputed to company based on the principle of *alter ego*, however, the reverse application of this principle is not permissible. When the company is the accused, its directors cannot be implicated automatically and can be roped-in only in two situations:

- a. If there is sufficient incriminating evidence against them as to their specific role, coupled with criminal intent on their part; or
- b. The statute provides for specific vicarious liability of directors of the acts of the company by way of a legal fiction.

Section 141 of the Negotiable Instruments Act, 1881 is an illustration which clearly states as regards offence under Section 138 (Dishonour of Cheques for insufficiency etc., of funds in the account) 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. However, this deeming fiction is subject to the exception that the person liable under Section 138 can escape prosecution 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. Similar provisions of deeming fiction to fasten liability on directors can be seen in penal provisions relating to pollution control laws.

The Supreme Court again in **Maksud Saiyed v. State of Gujarat** [2007 40 CompCas 590 (SC)] held that the Indian Penal Code does not contain any provision which attached vicarious liability on the part of managing director or directors of a company when the accused for a criminal offence is a company. The Court further held that vicarious liability of the managing director and other directors would arise only if there is a provision in that behalf in the statute providing punishment.

Recently the Supreme Court in **Shiv Kumar Jatia v. State of NCT of Delhi** (Criminal Appeal No.1263 of 2019 decided on 23rd August, 2019) settled a very important question of law as to whether the directors can be held vicariously liable for the offences on behalf of the company. Simply put the question that the Supreme Court was posed for answer is "whether the reverse of principle of attribution in respect of offences by companies is possible i.e., whether the managing director can be held responsible vicariously for a criminal offence attributable to a company?"

The facts of the case was that a guest at Hotel Hyatt Regency went to the 6th Floor of the hotel (terrace) for smoking and suffered a fall. He was grievously injured and was admitted to a hospital. The company that held the franchise for the hotel, its managing director and general manager among others were booked under Sections 336 (endangering life or personal safety of others), 338 (causing grievous hurt by endangering life or personal safety of others) under the Indian Penal Code, 1860 (IPC). The managing director and general manager sought to quash proceedings against them.



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The Supreme Court referred to its judgment in the Sunil Bharti Mittal Case and held that in the absence of a vicarious liability provision in the statute, an individual who acts on behalf of the company can be made an accused, along with the company, only if there is sufficient evidence of his active role coupled with criminal intent. The Supreme Court further held that though there are allegations of negligence on part of hotel and its managing director and officers and staff who were in charge of day to day affairs of the hotel, so far as managing director was concerned, no allegation was made directly attributing the negligence with the criminal intent.

While the allegations were principally made against the company, its managing director and other staff members who were in charge of day to day affairs of the company, so far as the managing director, the allegations were that he was attending all the meetings of the company and various decisions were being taken under his signatures and hence he ought to be held liable. This, the Court held was clearly a vague allegation and does not establish any link between the managing director and the act/omission alleged. Hence, the Court quashed the proceedings so far as the managing director was concerned.

The Court however, did not quash the proceedings against the general manager of the hotel. He pleaded that he too was out of country on the date of incident but the Court held that general manager stands on a different footing than that of, Managing Director. It would be a matter of trial to assess whether any in-charge arrangements were made for his responsibilities properly etc to ascertain his culpability.

The aforesaid decision settles two important principles as regards prosecution of directors of a company in a criminal offence as under:

- a) Unless a director has been proven to have perpetrated the offence with criminal intention or guilty mind and has actively played a role in the offence, he or she cannot be held liable.
- b) Vicarious liability will not fasten on to a director unless the statute itself provides for such fastening of liability.

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