

A DIRECTOR OR PARTNER CANNOT BE HELD TO BE VICARIOUSLY LIABLE FOR A CRIMINAL OFFENCE UNDER THE NEGOTIABLE INSTRUMENTS ACT, 1881 (1) MERELY BECAUSE OF BEING A DIRECTOR OR PARTNER OF THE COMPANY OR FIRM AND (2) IN CASES WHERE THE COMPANY OR FIRM AS A PRINCIPAL OFFENDER HAS NOT BEEN MADE AN ACCUSED IN THE PROCEEDINGS

INTRODUCTION:

*The Apex Court in its recent decision in **Dilip Hiraramani v. Bank of Baroda**¹ held that under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881, vicarious liability of a director or partner only arises when the company or firm commits the offence as the primary offender. Furthermore, a partner of a partnership firm cannot be convicted merely because he was a partner of the firm which had taken the loan or that he stood as guarantor for such a loan.*

FACTS:

The Bank of Baroda ("**the Respondent Bank**"), had granted term loans and cash credit facility to a partnership firm namely M/s. Global Packaging ("**the Firm**"), to the tune of Rs. 6,73,80,000/- (Rupees Six Crore Seventy-Three Lakhs and Eighty Thousand only). In part repayment of the loan, the Firm, through its authorized signatory, Mr. Simaiya Hariramani, had issued three cheques. However, the cheques were dishonoured on presentation due to insufficient funds.

On 4th November 2015, the Respondent Bank issued a demand notice to Mr. Simaiya Hariramani under Section 138 of the Negotiable Instruments Act, 1881 ("**NI Act**"). On 7th December 2015, the Respondent Bank filed a complaint under Section 138 of the NI Act before the Court of Judicial Magistrate, Balodabazar, Chhattisgarh, against Mr. Simaiya Hariramani and Mr. Dilip Hiraramani ("**the Appellant**"). The Firm was not made an accused. Mr. Simaiya Hariramani and the Appellant, as per the cause title of the proceedings were shown as partners of the Firm. The Respondent Bank claimed vicarious

¹ [2022 SCC Online SC 579].

liability of both the accused under Section 20 of the Partnership Act 1932, stating that the Appellant, being a partner of the Firm, was equally responsible and liable.

By the judgment dated 19th February 2019 of the Judicial Magistrate First Class, Balodabazar, Chhattisgarh, the Appellant and Mr. Simaiya Hariramani were convicted under Section 138 of the NI Act. Thereafter, an appeal preferred by the Appellant and Mr. Simaiya Hariramani challenging their conviction was dismissed by the Sessions Judge, Balodabazar, Chhattisgarh by way of its order dated 21st November 2019. The Appellant and Mr. Simaiya Hariramani challenged the aforesaid order before the High Court of Chhattisgarh, which also dismissed the appeal by way of its impugned judgment dated 12th October 2020. The Hon'ble High Court relied upon the decision of the Apex Court in *Monaben Ketanbhai Shah and Another v. State of Gujarat and Others*² wherein it was observed that the liability under the NI Act is only upon the partners who are responsible for the firm for conduct of its business and that in the present case, both the Appellant and Mr. Simaiya Hariramani had furnished guarantees of

the amount borrowed by the Firm from the Respondent Bank.

Being aggrieved by this decision, the Appellant approached the Apex Court.

ISSUE FOR CONSIDERATION:

The issues for consideration before the Apex Court were twofold:

(1) Whether a director or partner can be held to be vicariously liable merely because of being a director or partner of a company or firm? (2) Whether a director or partner can be convicted and held to be vicariously liable when the company or partnership firm is not an accused in the criminal proceedings?

JUDGMENT:

The Apex Court observed that sub-section (1) to section 141 of the NI Act follows that a person who does not bear out the requirements '*in charge of and responsible to the company for the conduct of its business*' is not vicariously liable under section 141 of the NI Act. Further that the burden is on the prosecution to show that the person prosecuted was in charge of and responsible to the company for conduct of its business. The proviso which is in the nature of an exception states that a person liable under sub-section (1) shall

² (2004) 7 SCC 15.

not be punished if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence. The onus to satisfy the requirements and take benefit of the proviso is on the accused.

Coming to sub-section (2) to Section 141 of the NI Act, the Apex Court observed that the same does not state that the persons enumerated which include an officer of the company can be prosecuted and punished merely because of their status or position as a director, manager, secretary or any other officer unless the offence in question was committed with their consent or connivance or is attributable to any neglect on their part. The onus under sub-section (2) to section 141 of the NI Act is on the prosecution and not on the person being prosecuted.

The Apex Court placed reliance on the judgment of *State of Karnataka v. Pratap Chand and Others*³, wherein it was held that notwithstanding the legal position that a firm is not a juristic person, a partner is not vicariously liable for an offence committed by the firm unless one of the twin requirements under section 141 of the NI Act were satisfied.

³ (1981) 2 SCC 335

⁴ (2010) 3 SCC 330

The Apex Court also placed reliance on the judgment in *National Small Industries Corporation Limited v. Harmeet Singh Paintal and Another*⁴, which *inter alia* held that a person sought to be made vicariously liable should be in charge of and responsible for the conduct of the business of the company at the relevant time and the same has to be averred as a fact as there is no deemed liability of a director in such cases.

The Apex Court observed that in the present case, it was admitted by the Respondent Bank that the Appellant in his personal capacity or otherwise as a partner of the Firm had not issued any of the three cheques which had been dishonoured. In the absence of any evidence led by the prosecution to show and establish that the Appellant was in charge of and responsible for the conduct of the affairs of the firm, the Apex Court relied on the expression '*a person in overall control of the day-to-day business of the company or the firm*' as interpreted by the Apex Court in *Girdhari Lal Gupta v. D.H. Mehta and Another*⁵. In the present case, the Firm had not been made an accused or even summoned to be tried for the offence.

The Apex Court in the present judgment held that the Appellant

⁵ (1971) 3 SCC 189.

cannot be convicted merely because he was a partner of the firm which had taken the loan or that he stood as a guarantor for such a loan. The Partnership Act, 1932 creates civil liability. Further, the guarantor's liability under the Indian Contract Act, 1872 is a civil liability. The Appellant may have civil liability and may also be liable under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. However, vicarious liability in the criminal law in terms of Section 141 of the NI Act cannot be fastened because of the civil liability.

In respect of the second issue, the Apex Court relied on the judgment of *Aneeta Hada v. Godfather Travels and Tours Pvt. Ltd*⁶. The question before the Apex Court in the aforesaid matter was whether a director can be prosecuted without the company being prosecuted. The Apex Court had held that for maintaining the prosecution under Section 141 of the NI Act, arraigning of a company as an accused is imperative and that the other

categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself.

The Apex Court observed that the provisions of Section 141 impose vicarious liability by deeming fiction which presupposes and requires the commission of the offence by the company or firm. Therefore, unless the company or firm has committed the offence as a principal accused, the persons mentioned in sub-section (1) and (2) would not be liable and convicted as vicariously liable. Section 141 of the NI Act, extends vicarious criminal liability to officers associated with the company or firm when one of the twin requirements of section 141 have been satisfied, which person then by deeming fiction is made vicariously liable and punished. However, such vicarious liability arises only when the company or firm commits the offence as a primary offender.

In the circumstances above, the Apex Court set aside the Appellant's order of conviction.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

⁶ (2012) 5 SCC 661