



Role of Non Executive Director when they have been prosecuted under Sections 138-141 of the Negotiable Instruments Act,1881 and study of U.K System with Special Reference to Birla Tyres Limited cases.

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I. Background

History and its Present

Birla Tyres is a division of Kesoram Industries Limited incorporated as per Companies Act, 1919 then under 1956 having CIN: 117119WB1919PLCOO3429(CIN: Corporate Identification Number) where it was known as Kesoram industries and cotton mills limited on 18th October 1919 later it got renamed as Kesoram cotton mills later it got as Kesoram Industries limited on 23/06/1986¹. Incorporation means to describe a business to be registered with a state to become a separate legal entity or an artificial person as persons in the company are separate from the business where a business must go under perpetual succession meaning that business entity often is owned by shareholders or by guarantee or by both the business must go on. As a part of Kesoram industries limited, Birla Tyres was first established in 1991 with a registered office at Birla House, Kolkata, West Bengal, they were one of the manufacturers of tyres for automobiles, ranging from two wheelers to trucks and buses, earthmovers tyres and tyres for off road with this it has been able to the catering needs of their customers. The company have collaborated with the world class tyre manufacturer, Pirelli in the development and production of its tyres. Since then Birla Tyres has built up a strong reputation and had been recognised as one of the best tyre manufacturers in the domestic markets and international markets. Many international experts have accredited Birla Tyres with their certificates for the quality of their products and for customers' satisfaction which includes DNV Business Assurance, TPM, Standards Organisation of Nigeria, Government of India, etc. In 2018 the Birla tyres became a separate legal entity as Birla

Tyres Private Limited. Now in 2022 it has been filed under insolvency law under section 9 of IBC, 2016 where by a Resolution plan meaning where the process of how things will be done for conduct of the business has been submitted by Resolution professional who conducts the entire corporate insolvency resolution process a process where the whole company which is facing problem gets a solution to run the company either by transferring the management or by liquidation and manage the operations of the corporate debtor which is the company under the corporate insolvency process under section 23 of the IBC, 2016 and now under section 30 of IBC,2016 now being transferred to Himadri Speciality Chemicals Ltd and Dalmia Bharat Refractory's.

Who are Directors and How it is different from Key Managerial Persons (KMP):

Directors are those persons who out of their experiences which they have gained over several years give new ideas for working of the company, where the executive directors look into the day to day operations of the company who are appointed by the board of directors where all the directors sit together discuss regarding the operations of the company and discuss about their future plans which the company needs for its future as per section 2(34) of Companies Act, 2013 earlier which was under 2(13) of 1956. Directors are the one who are having a DIN number meaning a unique number which is given to every director by The Ministry of Corporate Affairs under section 153 and 154 of Companies act. Sir Viscount Haldane L.C., in the case of Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Company Ltd. (1915), while commenting on the characteristics that a company possesses and the inability of a company to work on its own, opined that "A corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its

¹ Memorendum of Association of Kesoram Industries



active and directive will must consequently be sought in the person of somebody who, for some purposes, may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.”²

What is the work of the directors?

Directors are the elected representatives who are entrusted with the management and working of a company. They owe fiduciary duties to the company and are responsible for its governance. In the case of Agarwal Trading Corpn. v. Collector of Customs (1972), it was held by the Apex Court that the meaning of the term ‘director’ in relation to a firm connotes to the partner of that firm. In conclusion, the term director connotes a person who has been elected or appointed in accordance with the law and who has been conferred with the task or function of managing and directing the affairs of a company. Directors are often regarded as the brain of a company. They hold a pivotal position in a company’s structure as they make important decisions for the company in board meetings or in special committee meetings organised for certain particular purposes. Also, it is noteworthy that a director has to work in compliance with the provisions of the 2013 Act.

Types of Directors:

Directors can be of different types like the executive directors who are looking in to day to day operations such as Managing Director or Whole Time Directors similarly Non Executive Directors do not look into day to day operations of the business but may give their ideas out of their expertise including Independent Directors and Women Directors, Nominee Directors, etc. The Directors are under the fiduciary duty meaning when someone has a fiduciary duty to someone else, the person with the duty must act in a way that will benefit someone else financially. The person who has a fiduciary duty is called the fiduciary, and the person to whom the duty is owed is called the principal or the beneficiary. of the companies act as per section 166 (2) where they have a duty of due care, loyalty, good faith and promote success to the company, avoid conflict of interest, etc.

KMP as per section 2(51) meaning and their appointment as per section 203 Key Managerial Personnel (KMPs) are senior-level

employees like who have more experience or someone nominated which can include a youth but that is an exceptional circumstance who are responsible for the operations and management of the company, such as the CEO, CFO, and Company Secretary and any such officers.

Mangers as per section 2(53) means an individual who does the work of superintendence, control and who has the skills of management of whole and work according to the discretions of the board. A Manager under the Companies Act is a person appointed to manage the affairs of the company under the superintendence, control, and direction of the Board of Directors. The manager may work under the CEO who is just given a department to maintain whereas the CEO sees the daily operations of the Company.

What is Cheque Dishonour and so how it leads to the cases against the Birla Tyres:

Cheque Dishonour is when it is dishonoured by non payment of the maker of the note, acceptor of the bill or the drawee makes default in payment upon being duly required to pay, it is known as a dishonour of cheque as per section 92 of the Negotiable Instrument Act. This rejection can occur for reasons such as insufficient balance in an account, a signature mismatch, or a post-date, insufficient balance in an account, closed the bank account, a signature mismatch, making unauthorised changes in the cheque or incorrect account number. A dishonoured cheque is done where there is a default on acceptance upon being duly required to accept the bill or where formally to the court the it is executed and it is not accepted and where the drawee is incompetent for the contract or where the acceptance is qualified the bill be treated as dishonoured As per section 91 of NI Act, 1881.

In Birla Tyres cases like in Vivek engineering Co Vs Birla Tyres Ltd(C.S. No. 50524/2021, MM Court, Calcutta) where vivek engineering co issued a purchase order for purchase of steel products where when they submitted the cheques for the product it told that the funds were insufficient in the bank; Similarly in the case of Brite rubber Processors Pvt Ltd vs Birla Tyres(NI 06/2022, CJM, West Tripura, Agartala) where tons of rubber were purchased were some amount were paid by the accused company but the later half were dishonoured as the accounts were closed; Similarly in the Cossipore Industries Ltd vs Birla Tyres Ltd(CS 5054/2022, CMM Kolkata) where purchase order for tons of steel products were given when the cheques were submitted to the bank

² <https://blog.ipleaders.in/director-companies-act-2013/>



which were dishonoured on the grounds of Funds insufficient; Similarly in the case of M/s Edathala Polymers Ltd vs Birla Tyres Ltd(Special Judicial magistrate 1st Class Magistrate's Court for NI Act, Ernakulam) the cheques were submitted for purchase order of polymer products were Funds insufficient were told by the bank; Similarly in Genesis Ventures Ltd vs Birla Tyres Ltd(NI case No: 02 of 2022;Ld Additional Chief judicial Magistrate at Sealdah) where when the cheques were submitted account closed it was told by the bank; Similarly in the case of Goel Rumang Vs Birla Tyres Ltd(CS No- 62907/2022;CMM Kolkata) the cheques were submitted to the bank but bank dishonoured the cheque due to funds insufficient in the bank account; similarly in the case of Hind Agency vs Birla Tyres Ltd(CN- 1647/2022; Adl. CMM, Calcutta)the cheques were submitted by the hind agency the cheques were dishonoured due to which they accused the company of avoided or not willing to or neglected or refused to pay the complaint was alleged.

Here as they have different remedies like filing a money suit as a civil case but it fails the liability of the person who is responsible for such act. It is their discretionary power to file a case under Section 138 and 141 of Negotiable Instrument Act for their money which is their right and to get to know about who is vicariously liable for the acts done.

Section 138 to 148 of Negotiable Instruments Act, 1881 is under the Chapter of 17 where Penalties in case of Dishonour of certain cheques for insufficiency of funds.

Now what is a negotiable instrument- A negotiable instrument may be defined as "an instrument, the property in which is acquired by anyone who takes it bona fide, and for value, notwithstanding any defect of title in the person from whom he took it, from which it follows that an instrument cannot be negotiable unless it is such and in such a state that the true owner could transfer the contract or engagement contained therein by simple delivery of instrument"³

In Section 13 of negotiable Instruments Act,1881 it says " It means a promissory note, bill of exchange or cheque payable either to order or to bearer. It also explains that it is to be expressed to a particular person and prohibits transfer or intention of transferring where cheques which is payable to the bearer or last endorsement which is done on

blank bill where only the name of the person is written.

The Main Characteristics which are required for negotiable instruments are: "

1. The holder of the instrument is presumed to be the owner of the property contained in it.
2. They are freely transferable upon consent of the parties
3. The holder in due course is entitled on the instrument to sue on his or her own name.
4. The instrument is transferable till the maturity
5. A holder in due course gets the instrument free from all the defects of the title from any previous holder."⁴

What is a cheque?

As per Section 6 of NI Act, 1881 simply stated, a cheque is a bill of exchange (as per section 5 of NI Act,1881 it is an unconditional order which is signed by the maker directing the certain person to pay a certain sum of money only to the person to whom it is written for the order) drawn on a bank payable always on demand it also includes the post dated cheques as they are being done on the consent of the parties. Thus, a cheque is a bill of exchange with two additional qualifications, namely: (i) it is always drawn on a banker, and (ii) it is always payable on demand. A cheque being a species of a bill of exchange must satisfy all the requirements of a bill of exchange.

Now there is another remedy by the operational creditor that is file a money Suit under Institution of Suits under Order 4 CPC and Essentials of Plaintiff are a suit is instituted by way of a plaint. Plaintiff is the description of facts of the case and the exact amount being claimed along with any interest and the Plaintiff is to be accompanied by the supporting documents viz, written contract, particulars of claim and correspondences if any. This plaint is required to be proved by way of an accompanying affidavit and an appropriate verification of the facts. Here a Suit for recovery of money is a civil relief and acts as an effective remedy to recover money from the delinquent. The suit can be filed under Order IV of the Code of Civil Procedure 1908 (CPC). It is a summary suit (Order 37, Code of Civil Procedure) that offers speedy disposal of the suit as here the defendant is not required to defend as a matter of right where it

³Willis- the law of negotiable securities, page 6

⁴ Company Secretary Executive Book on Jurisprudence and General Laws.



also defines the jurisdiction of the court to execute out the a decree. Similarly in section 38 it allows a decree to be passed by a court to be transferred to another court for execution. Similarly, Section 39 provides for the procedure for transferring a decree for execution to another court and Section 47 deals with the objection that are raised by the judgement debtor when the degree is to be executed which needs to done according to order 21 under modes depending upon the nature of relief which is granted.

Now in this type of case the burden of proof existence or nonexistence of a particular thing or fact by means the obligation on the part of a party to prove the leaves on the accused as per section 118 of the NI Act which says:-

"118. Until the contrary is proved, the following presumptions shall be made:-

(a) of consideration: that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed negotiated or transferred for consideration.

(b) as to date: that every negotiable instrument bearing a date was made or drawn such date.

(c) as to time of acceptance: that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity.

(d) as to time of transfer: that every transfer of a negotiable instrument was made before its maturity.

(e) as to order of endorsements that the endorsements appearing upon a negotiable instrument were made in the order in which they appear thereon.

(f) as to stamps: that a lost promissory note, bill of exchange or cheque was duly stamped.

(g) that holder is a holder in due course that the holder of a negotiable instrument is a holder in due course."

Now Directors per se culpable under section 141 of NI Act.1881 only if a) they are in charge of the responsible for the conduct of the of the business meaning active involvement on day to day operations and affairs of the business and b) at that time of business has the liability which is not automatic meaning failed to exercise due diligence to prevent the offence including proper financial

control and taking the responsible steps to avert issuing dishonoured cheques.

Now when does the director is not responsible when a) unaware of the offences and b) exercised due diligence to prevent it.

Now as the cheque is being bounced it is filed u/s 138 of NI Act, 1881 where u/s 141 the cases regarding company are being taken which says that Section 141(1) states that if the offense of dishonour of a cheque is committed by a company, every person who at the time the offense was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, shall be deemed to be guilty of the offense and shall be liable to be proceeded against and punished accordingly. The culpability rests on the expression "was in charge of and was responsible to the company for the conduct of the business of the company". This implies that mere designation as a director or officer is not sufficient. The key factors are being in charge and responsible for the company's business conduct. So being in this all the cases above nonexecutive directors are not involved in this cases so filling cases against them cannot be done.

Here as the complaints that are made against Birla Tyres Ltd does not specifying how each person was involved and responsible, it may be difficult to establish culpability under Section 141(1). The complaints should ideally describe the specific roles, responsibilities, and conduct of each person to show that they were "in charge of and responsible" for the company's business leading to the cheque dishonour. If the complaints are general, it could indicate a lack of evidence or oversight in framing the charges specifically against individuals as required by Section 141(1).

a) Non-executive/independent directors may not be liable unless particular circumstances show their involvement (Everest Building Solutions Ltd vs BMTC Industries Ltd, 2022 SCC OnLine Del 1568)

b) Susela Padmavathy Amma vs Bharti Airtel and in Rajesh Viren Shah vs Redington India ltd) judgment wherein the Court held that, Complainant at the complaint stage must mandatorily demonstrate to the satisfaction of the Court meaning the discretionary power of the court as to how each Director who had been assailed under Section 138, was involved in the day to day management of a Company.(2024 Scc Online Sc 311)



Here the Courts including lower courts examine the role, responsibilities, and actual conduct rather than just designations. There doesn't seem to be a clear consensus emerging from the cases, as the culpability depends on the specific facts and evidence in each matter. Courts take a case-by-case approach based on the extent of involvement in business conduct.

From a payee's perspective, ascertaining who would fall under Section 141(1) for a company can be challenging before entering into a transaction but before hand details upfront may indeed to deter potential customers. So the alternative options would be:

- a) **Alternative Remedy:** The payee can consider filing a summary suit under Order XXXVII of the Civil Procedure Code for recovery of the debt, which may be quicker than criminal prosecution. However, this may not have the same deterrent effect as criminal action. But as there is no time limit framed it takes longer time than usual.
- b) **Due Diligence:** Conduct background checks on the company, its directors, and officers to assess potential risks before entering into transactions which are needed as knowing with whom transaction needs to be done is a essential ingredient with the company.
- c) **Contractual Safeguards:** Include clauses in the contract specifying individuals responsible for business conduct, consequences of dishonour, force majeure and place of filing a case.

It is to note that Under the Companies Act, 2013, an "officer in default" is defined for offenses under the Act in section 2(60). However, for offenses under other laws like the NI Act, the definition is not directly applicable. To proceed against a company for cheque dishonour under the NI Act, the drawee would needs to identify the specific individuals "in charge of and responsible for" the company's business conduct leading to the offense, as per Section 141(1).

In an IBC case, after the approval of a Resolution Plan, the moratorium under Section 14 ceases to apply on the Corporate Debtor. The successful resolution applicant takes over the corporate debtor under section 31 of IBC, 2016 and any pending cases or liabilities would continue against the new management unless specifically addressed in the Resolution Plan.

Who is normally responsible for any complaint against the company?

The CEO, being a KMP responsible for the company's operations, could potentially be held liable under Section 141(1) of the NI Act if they

were "in charge of and responsible for" the business conduct leading to the cheque dishonour and if CEO is not present then the person acting on behalf of the CEO shall be liable. Regarding Section 141(12) of the Companies Act, 2013, it provides a limited exemption for certain categories of non-executive directors from specific liabilities. However, this exemption is subject to riders and may not apply in cases of dishonour of cheques or offenses under other laws like the NI Act.

The terms "in his knowledge" and "consent" used in Section 141 of the NI Act are indeed vague and subject to interpretation based on the specific circumstances of each case like where funds are insufficient their it needs to be handled with why funds were insufficient and where accounts were closed why it was closed and if closed where have they shifted and why the creditors are unaware of it must be kept to see it. Lower Courts would need to examine the evidence as per declaration or invoices that needs to be determining if the responsible individuals had actual knowledge or gave implied consent regarding the conduct leading to the cheque dishonour.

The process which is followed in the lower court is as follows:

- 1) **Filing of complaint:** The complaint needs to be filed before the jurisdictional magistrate within 30 days from the accrual of the cause of action. The complainant needs to be present before the magistrate at the time of filing. The original documents need to be shown to the magistrate. If prima-facie a case is made out, the magistrate will post the matter for sworn statement.
- 2) **Sworn Statement:** At this stage, the complainant needs to enter the witness box and give further details regarding the case. If the magistrate is satisfied that there is some substance in the case of the complainant, then he will issue a summons to the accused.
- 3) **Appearance of Accused:** On receipt of summons, the accused need to appear in the court. If he does not appear in the court, the court will issue an arrest warrant against him. After appearance, the accused is supposed to take a bail from the court with or without sureties. If the accused is unable to furnish a surety then he can deposit a cash security, instead of surety. This cash security is refundable to the accused after the conclusion of the case.
- 4) **Recording of Plea:** In the next stage, the court will ask the accused as to whether he has committed the offence or not. If the accused admits the guilt, the court will immediately give him



punishment. If he pleads innocence, the court will post the matter for evidence.

5) Evidence: The Complainant has to furnish his evidence, normally by way of affidavit; this is known as examination-in-chief. He needs to produce all documents in support of his case like bounced cheque, dishonour memo, copy of notice etc. Later complainant will be cross examined by the accused. If there are other witnesses in support of the complainant, then their evidence also has to be recorded.

6) Statement of the Accused: After the Complainant side evidence is over, the court will put some questions to the accused regarding his guilt. An accused needs to give his version to the same.

7) Defence Evidence: After the Accused statement the court will give an opportunity to the accused to leave his evidence. The accused can also produce documents in support of his case, as well as witnesses in his support. Accused and his witnesses will be cross examined by the complainant. After this, the case is posted for arguments.

8) Arguments: Both the Complainant and the accused will submit their arguments before the court. They can also furnish judgments of high courts and Supreme Court in support of their case. Normally a written argument containing a gist of the oral argument is also furnished to the court.

9) Judgement: After the arguments, case is posted for judgement. If the court finds that the accused has committed offence, he will be punished with fine or imprisonment. If he is innocent, the court will acquit him. If the accused is convicted, he can file an appeal before the sessions court within 30 days.

Therefore the whole process needs to be followed till the dismissal of the case or till the case of withdrawal.

How UK is working regarding this:

In the UK, the approach to criminal liability for dishonoured cheques may have evolved over time, considering the phasing out of cheques and the digitization of payments. In the UK, the criminal offense of dishonoured cheques was introduced in the Theft Act 1968. Over time, as cheque usage declined and digital payments became more prevalent, the relevance and application of this offense came under scrutiny. Courts in the UK had to grapple with issues like:

1) Defining the scope of "knowledge" and "consent" for company directors/officers in dishonoured cheque cases.

2) Determining culpability when cheque dishonour may have been due to negligence rather than intentional fraud.

3) Reconciling the criminal offense with the changing commercial practices and the decline in cheque usage.

Through a series of judicial interpretations and legislative amendments, the UK sought to clarify the ambiguities and contradictions in the law. Ultimately, the criminal offense for dishonoured cheques was repealed in 2015, as it was considered outdated and redundant in the digital age.

1. Judicial Interpretations:

Through various court rulings, the judiciary in the UK attempted to clarify the ambiguous terms like "knowledge" and "consent" in the context of company directors/officers liability for dishonoured cheques.

- In R v Ghosh (1982), the court established a two-stage test to determine whether the defendant had the necessary "knowledge" for criminal liability, considering both the objective and subjective elements.

- In R v Barratt (1995), the court held that "consent" could be inferred from a director's failure to prevent or protest against the dishonoured cheque, even if they did not actively participate in the transaction.

2. Legislative Reforms:

To address contradictions and keep pace with changing commercial practices, the UK enacted several legislative reforms:

- The Theft Act 1968 was amended in 1994 to clarify that the offense of dishonoured cheques applied only to cases involving an "intention to defraud" rather than mere negligence or oversight.

- The Company Directors Disqualification Act 1986 introduced provisions for disqualifying directors found guilty of offenses related to dishonoured cheques, underscoring their culpability.

- The Fraud Act 2006 modernized and consolidated various fraud offenses, including those related to dishonoured cheques, aiming to provide a more coherent legal framework.

3. Law Commission Reviews:

The UK Law Commission periodically reviewed the laws related to dishonoured cheques and proposed reforms to address ambiguities and contradictions:

- In 1994, the Law Commission recommended amendments to clarify the "knowledge" and "consent" requirements for company directors/officers liability.



- In 2015, after extensive consultation, the Law Commission recommended abolishing the criminal offense for dishonoured cheques, citing its declining relevance and the availability of civil remedies.

4. Repeal and Transition:

Following the Law Commission's recommendations, the UK government repealed the criminal offense for dishonoured cheques through the Deregulation Act 2015, effectively decriminalizing the conduct. However, the repeal was accompanied by transitional provisions to ensure ongoing cases and pending prosecutions were not disrupted. Civil remedies, such as debt recovery and insolvency proceedings, remained available for dealing with dishonoured cheque cases in the commercial realm.

The UK's approach involved a combination of judicial interpretations, legislative amendments, law commission reviews, and ultimately, the repeal of the criminal offense, reflecting a gradual evolution in response to changing commercial realities and the need to address ambiguities and contradictions in the law.