CHAPTER VI
CONCEPT OF VICARIOUS LIABILITY

Since partnership firms and companies occupy a major space in the mercantile world, so specific provisions with regard to prosecution of such entities have been incorporated in the Act. Explanation ‘A’ to section 141 of Negotiable Instruments Act defines the company for the purpose of this Act according to which company means anybody corporate including a firm or other association of individuals.\(^1\) According to section 142(a), no court shall take cognizance of the offence under section 138 except from a complaint made by the payee. There is no express or implied provision in the Act as to in what manner the company is to be represented in preferring a complaint for alleged refraction or violation of provisions under section 138 of the Act.\(^2\) However, the dictates of common sense, practical wisdom, prudence and experience impels the court in such a situation to enable the company to present a complaint before the court represented by some person connected with the affairs of the company. The person so connected with the affairs of the company may be either its manager, partner, managing partner or director or outsider authorized by the company. Only by making, such a construction and interpretation of the provisions of the said sections, the provisions of the Act can be made to work and life thereby given, having teeth for the enforcement of the provisions or any other interpretation given would have the effect of making no sense of those provisions.\(^3\)

6.1 Introduction

Section 141 dealing with offences by companies, provides if the person committing an offence under section 138 is a company, every person who was incharge of and responsible to the company for the conduct, of the business of the company as well as the company shall

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\(^3\) *Ibid.*
be deemed to be guilty of the offence, and therefore, this section 141 makes the company as well as all those persons incharge liable to be proceeded against and punished accordingly. It would not be sufficient to say that such a person was director of a company, but, if it is stated in the complaint and if it is alleged against a particular accused that he was incharge of the company and was responsible for conduct of business of the company, it would be sufficient for taking cognizance against such a accused. Whether he had ceased to be such a person or whether he was never associated with the company in such a capacity would be questions of fact which would have to be decided during the trial.\textsuperscript{4}

More often it is common that some of the partners of a firm may not even be knowing of what if going on day to day in the firm. There may be partners, better known as sleeping partners who are not required to take part in the business of the firm. There may be ladies and minors who were admitted for the benefit of partnership. They may not know anything about the business of the firm. It would be a travesty of justice to prosecute all partners and ask them to prove under the provisions to sub-section (1) that the offence was committed without their knowledge. It is significant to note that the obligation for the accused to prove under the proviso that the offence took place without his knowledge or that he exercised all due diligence to prevent such offence arises only when the prosecution establishes that the requisite condition mentioned in sub-section (1) is established. The requisite condition is that the partner was responsible for carrying on the business and was during the relevant time incharge of the business. In the absence of any such proof, no partner could be convicted.\textsuperscript{5}

Every director is not liable for the offence committed by a company as it is clear that no person could be prosecuted in the absence of a specific, clear and unambiguous assertion in the complaint against such persons impleaded as accused that they were incharge of

\textsuperscript{4} Id. at 750.
\textsuperscript{5} Id. at 745.
and were responsible to the company for the conduct of the business at the material time when the offence was committed by the company. The complainant is bound to share that information in the complaint. The contents of the complaint are required to be meticulously scrutinized by the Magistrate before taking the same on file. Further proceedings in a complaint where no such averment and clear allegation has been made would be an abuse of judicial process. The requirement of specific, clear and unambiguous allegation in the complaint before the same is taken on file by a Magistrate cannot be relaxed. No person could be allowed to be prosecuted on imaginary grounds.6

6.2 Offences By Companies

Section 141 of the Act deals with offences by companies. It reads as follows:-

"141. Offences by companies. –

1) If the person committing an offence under Section 138 is a company, 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:

Provided that nothing contained in this sub-section shall render any person liable to punishment 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:

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government

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6 Id. at 757.
or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any Director, Manager, Secretary or other officer of the company, such Director, Manager, Secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation. - For the purposes of this section- (a) 'company' means anybody corporate and includes a firm or other association of individuals; and (b) 'director', in relation to a firm, means a partner in the firm."

On a perusal of the aforesaid provision, it is clear as crystal that if the person who commits an offence under Section 138 of the Act is a company, the company as well as other person in charge of or responsible to the company for the conduct of the business of the company at the time of commission of the offence is deemed to be guilty of the offence. Thus, it creates a constructive liability on the persons responsible for the conduct of the business of the company.

In Halsbury's Laws of England,⁷ it has been laid down that in general, a corporation is in the same position in relation to criminal liability as a natural person and may be convicted of common law and statutory offences including those requiring mens rea.

⁷ Volume 11(1), para 35.
While dealing with liability in respect of criminal prosecution, it has been stated that a corporation shall be liable for criminal prosecution for crimes punishable with fine; in certain jurisdictions, a corporation cannot be convicted except as specifically provided by statute.\(^8\)

In *H.L. Bolton (Engineering) Co. Ltd. v. T.J. Graham & Sons Ltd.*,\(^9\) Lord Denning, while dealing with the liability of a company, in his inimitable style, has expressed that a company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. In certain cases, where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. The learned Law Lord referred to Lord Haldane's speech in *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*,\(^10\) Elaborating further, he has observed that in criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or the managers will render the company itself guilty.

It may be appropriate at this stage to notice the observations made by Mac Naghten, J. in *Director of Public Prosecutions v. Kent and Sussex Contractors Ltd.*,\(^11\) as reproduced thus:

"A body corporate is a "person" to whom, amongst the various attributes it may have, there should be imputed the attribute of a mind capable of knowing and forming an intention - indeed it is much too late

\(^8\) *Corpus Juris Secundum*, Volume XIX, 1358.
\(^9\) (1956) 3 All E.R. 624.
\(^10\) (1915) AC 705, 713-714; 31 T.L.R. 294.
\(^11\) (1994) 1 All ER 119 (DC).
in the day to suggest the contrary. It can only know or form an intention through its human agents, but circumstance may be such that the knowledge of the agent must be imputed to the body corporate. Counsel for the respondents says that, although a body corporate may be capable of having an intention, it is not capable of having a criminal intention. In this particular case the intention was the intention to deceive. If, as in this case, the responsible agent of a body corporate puts forward a document knowing it to be false and intending that it should deceive. I apprehend, according to the authorities that Viscount Caldecote, L.C.J., has cited, his knowledge and intention must be imputed to the body corporate."

In this regard, it is also profitable to refer to the decision in *Iridium India Telecom Ltd. v. Motorola Inc and Ors.*,\(^\text{12}\) wherein it has been held that in all jurisdictions across the world governed by the rule of law, companies and corporate houses can no longer claim immunity from criminal prosecution on the ground that they are not capable of possessing the necessary mens rea for commission of criminal offences. It has been observed that the legal position in England and United States has now been crystallized to leave no manner of doubt that the corporation would be liable for crimes of intent. In the said decision, the two-Judge Bench has observed thus:

"The courts in England have emphatically rejected the notion that a body corporate could not commit a criminal offence which was an outcome of an act of will needing a particular state of mind. The aforesaid notion has been rejected by adopting the doctrine of attribution and imputation. In other words, the criminal intent of the "alter ego" of the

\(^{12}\) 2011(1) RCR(Criminal) 235.
company/body corporate i.e. the person or group of persons that guide the business of the company, would be imputed to the corporation."

There is no dispute that a company is liable to be prosecuted and punished for criminal offences. Although there are earlier authorities to the fact that the corporation cannot commit a crime, the generally accepted modern rule is that a corporation may be subject to indictment and other criminal process although the criminal act may be committed through its agent. It has also been observed that there is no immunity to the companies from prosecution merely because the prosecution is in respect of offences for which the punishment is mandatory imprisonment and fine.\textsuperscript{13}

6.3 Company to be Arrayed as an Accused

At one point of time, an issue had arisen before the Apex Court, as to whether a complaint could be held to be maintainable without making the company a party. The said controversy has been put to rest by a three-Judge Bench decision in Aneeta Hada v. Godfather Travels and Tours Private Limited\textsuperscript{14} wherein it has been held that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. It has been further held therein that there cannot be any vicarious liability unless there is a prosecution against the company.

6.3.1 Company is a Separate Entity

Company, although a juristic person, is a separate entity. Directors may come and go. The company remains. It has its own reputation and standing in the market which is required to be maintained. Nobody, without any authority of law, can sentence it or find it guilty of commission of offence. Before recording a finding that it is guilty of commission of a serious offence, it may be heard. The Director who was in charge of the company at one point of time may

\textsuperscript{13} Standard Chartered Bank v. Directorate of Enforcement, 2006(3) BCR 621.
\textsuperscript{14} 2012(2) RCR(Criminal) 854.
have no interest in the company. He may not even defend the company. He need not even continue to be its Director. He may have his own score to settle in view of change in management of the company. In a situation of that nature, the company would for all intent and purport would stand convicted, although, it was not an accused and, thus, had no opportunity to defend itself.15

Any person accused of commission of an offence, whether natural or juristic, has some rights. If it is to be found guilty of commission of an offence on the basis whereof its Directors are held liable, the procedures laid down in the Code of Criminal Procedure must be followed. In determining such an issue all relevant aspects of the matter must be kept in mind. The ground realities cannot be lost sight of. Accused persons are being convicted for commission of an offence under Section 138 of the Act inter alia on drawing statutory presumptions.16

6.3.1.1 Company Has a Right to be Heard

Various provisions contained in the Act lean in favour of a drawer of the cheque or the holder thereof and against the accused. Sections 20, 118(c), 139 and 140 of the Act are some such provisions. The Act is a penal statute. Unlike offences under the general law it provides for reverse burden. The onus of proof shifts to the accused if some foundational facts are established. It is, therefore, in interpreting a statute of this nature difficult to conceive that it would be legally permissible to hold a company, the prime offender, liable for commission of an offence although it does not get an opportunity to defend itself. It is against all principles of fairness and justice. It is opposed to the Rule of Law. No statute in view of our Constitutional scheme can be construed in such a manner so as to refuse an opportunity of being heard to a person. It would not only offend a common- sense, it may be held to be unconstitutional.17

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15 Ibid.
16 Ibid.
17 Ibid.
In Aneeta Hada's case, the court referred to Anil Hada v. Indian Acrylic Ltd.,\textsuperscript{18} and R. Rajgopal v. S.S. Venkat\textsuperscript{19}, distinguished the decision in Anil Hada and opined that the issue decided in the said case is to be understood in the factual matrix obtaining therein as the Company could not have been prosecuted, it being under liquidation. The observations to the effect that the Company need not be prosecuted against was regarded as obiter dicta and not the ratio decidendi. After stating so, it was observed that it is one thing to say that the complaint petition proceeded against the accused persons on the premise that the company had not committed the offence but the accused did, but it is another thing to say that although the company was the principal offender, it need not be made an accused at all.

Prosecution of the company is a sine qua non for prosecution of the other persons who fall within the second and third categories of the candidates, viz., everyone who was in-charge and was responsible for the business of the company and any other person who was a director or managing director or secretary or officer of the company with whose connivance or due to whose neglect the company had committed the offence.\textsuperscript{20}

The learned Judge also took note of the maxim lex non cogit ad impossibilia and expressed thus:-

"True interpretation, in my opinion, of the said provision would be that a company has to be made an accused but applying the principle "lex non cogit ad impossibilia", i.e., if for some legal snag, the company cannot be proceeded against without obtaining sanction of a court of law or other authority, the trial as against the other accused may be proceeded against if the ingredients of Section 138 as also 141 are otherwise fulfilled. In such an event, it would not be a case where the company had

\textsuperscript{18} 2000(1) RCR (Criminal) 1.
\textsuperscript{19} (2001) 10 SCC 91.
\textsuperscript{20} Ibid.
not been made an accused but would be one where the company cannot be proceeded against due to existence of a legal bar. A distinction must be borne in mind between cases where a company had not been made an accused and the one where despite making it an accused, it cannot be proceeded against because of a legal bar.”

6.3.1.2 Reasons for Impleading a Company

The proposition that impleadment of the company is a categorical imperative to maintain a prosecution against the directors, various signatories and other categories of officers is essentially based upon the following reasons:

a) The language of Section 141 of the Act being absolutely plain and clear, a finding has to be returned that the company has committed the offence and such a finding cannot be recorded unless the company is before the court, more so, when it enjoys the status of a separate legal entity. That apart, the liability of the individual as per the provision is vicarious and such culpability arises, ipso facto and ipso jure, from the fact that the individual occupies a decision making position in the corporate entity. It is patent that unless the company, the principal entity, is prosecuted as an accused, the subsidiary entity, the individual, cannot be held liable, for the language used in the provision makes the company the principal offender.

b) The essence of vicarious liability is inextricably intertwined with the liability of the principal offender. If both are treated separately, it would

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21 Supra Note 14.
amount to causing violence to the language employed in the provision.

c) It is a fundamental principle of criminal law that a penal provision must receive strict construction. The deeming fiction has to be applied in its complete sense to have the full effect as the use of the language in the provision really ostracizes or gets away with the concepts like "identification", "attribution" and lifting the corporate veil and, in fact, puts the directors and the officers responsible in a deemed concept compartment on certain guided parameters.

d) The company, as per Section 141 of the Act, is the principal offender and when it is in existence, its non-impleadment will create an incurable dent in the prosecution and further, if any punishment is inflicted or an unfavourable finding is recorded, it would affect the reputation of the company which is not countenanced in law.

e) The terms used "as well as the company" in Section 141(1) of the Act cannot mean that no offence need be committed by the company to attract the vicarious liability of the officers in-charge of the management of the company because the first condition precedent is commission of the offence by a person which is the company.  

6.4 Section 141 of The Act Creates A Legal Fiction

Lord Asquith, in East end Dwellings Co. Ltd. v. Finsbury Borough Council, had expressed his opinion as follows:

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22 Ibid.
"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents, which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it.... The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

In The Bengal Immunity Co. Ltd. v. State of Bihar and others, the majority in the Constitution Bench have opined that legal fictions are created only for some definite purpose. In Hira H. Advani v. State of Maharashtra, while dealing with a proceeding under the Customs Act, especially sub-section (4) of Section 171-A wherein an enquiry by the custom authority is referred to, and the language employed therein, namely, "to be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code", it has been opined as follows:

"It was argued that the Legislature might well have used the word "deemed" in Sub-section (4) of Section 171 not in the first of the above senses but in the second, if not the third. In our view the meaning to be attached to the word "deemed" must depend upon the context in which it is used."

In State of Tamil Nadu v. Arooran Sugars Ltd., the Constitution Bench, while dealing with the deeming provision in a statute, ruled that the role of a provision in a statute creating legal fiction is well settled. Reference was made to The Chief Inspector of

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24 AIR 1955 Supreme Court 661.
25 AIR 1971 Supreme Court 44.
26 AIR 1997 Supreme Court 1815.
Mines and another v. Lala Karam Chand Thapar Etc.,27 J.K. Cotton Spinning and Weaving Mills Ltd. and anr. v. Union of India and others,28 M. Venugopal v. Divisional Manager, Life Insurance Corporation of India29 and Harish Tandon v. Addl. District Magistrate, Allahabad30 and eventually, it was held that when a statute creates a legal fiction saying that something shall be deemed to have been done which in fact and truth has not been done, the Court has to examine and ascertain as to for what purpose and between which persons such a statutory fiction is to be resorted to and thereafter, the courts have to give full effect to such a statutory fiction and it has to be carried to its logical conclusion.

It is submitted that from the aforesaid pronouncements, the principle that can be culled out is that it is the bounden duty of the court to ascertain for what purpose the legal fiction has been created. It is also the duty of the court to imagine the fiction with all real consequences and instances unless prohibited from doing so. That apart, the use of the term 'deemed' has to be read in its context and further the fullest logical purpose and import are to be understood. It is because in modern legislation, the term 'deemed' has been used for manifold purposes. The object of the legislature has to be kept in mind.

The word 'deemed' used in Section 141 of the Act applies to the company and the persons responsible for the acts of the company. It crystallizes the corporate criminal liability and vicarious liability of a person who is in charge of the company. The criminal liability on account of dishonour of cheque primarily falls on the drawee company and is extended to the officers of the company and as there is a specific provision extending the liability to the officers, the conditions incorporated in Section 141 are to be satisfied.

Thus when the drawer of the cheque who falls within the ambit of Section 138 of the Act is a human being or a body corporate or even

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27 AIR 1961 Supreme Court 838.
28 AIR 1988 Supreme Court 191.
29 (1994) 2 SCC 323.
30 1995(1) RCR (Rent) 217.
firm, prosecution proceedings can be initiated against such drawer. In this context the phrase "as well as" used in Sub-section (1) of Section 141 of the Act has some importance. The said phrase would embroil the persons mentioned in the first category within the tentacles of the offence on a par with the offending company. Similarly the words "shall also" in Sub-section (2) are capable of bringing the third category persons additionally within the dragnet of the offence on an equal par. The effect of reading Section 141 is that when the company is the drawer of the cheque such company is the principal offender under Section 138 of the Act and the remaining persons are made offenders by virtue of the legal fiction created by the legislature as per the section. Hence the actual offence should have been committed by the company, and then alone the other two categories of persons can also become liable for the offence.\(^3\)

A principle of statutory interpretation embodies the policy of the law, which is in turn based on public policy. The court presumes, unless the contrary intention appears, that the legislator intended to conform to this legal policy. A principle of statutory interpretation can therefore be described as a principle of legal policy formulated as a guide to legislative intention.\(^3\)

It will be apt to quote a passage from Maxwell's The Interpretation of Statutes:\(^3\)

"The strict construction of penal statutes seems to manifest itself in four ways: in the requirement of express language for the creation of an offence; in interpreting strictly words setting out the elements of an offence; in requiring the fulfilment to the letter of statutory conditions precedent to the infliction of punishment; and in insisting on the strict observance of technical provisions concerning criminal procedure and jurisdiction."

\(^3\) Supra Note 23.
\(^3\) Francis Bennion's, Statutory Interpretation, Section 263 (1999).
\(^3\) 12th Edn., at 403 (1980).
The aforesaid passages have been referred only to highlight that there has to be strict observance of the provisions regard being had to the legislative intendment because it deals with penal provisions and a penalty is not to be imposed affecting the rights of persons whether juristic entities or individuals, unless they are arrayed as accused. It is to be kept in mind that the power of punishment is vested in the legislature and that is absolute in Section 141 of the Act which clearly speaks of commission of offence by the company. It is often argued from the side of the payee that the use of the term "as well as" in the Section is of immense significance and, in its tentacle, it brings in the company as well as the director and/or other officers who are responsible for the acts of the company and, therefore, a prosecution against the directors or other officers is tenable even if the company is not arraigned as an accused. The words "as well as" have to be understood in the proper context. In Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and others 34 it has been laid down that the entire statute must be first read as a whole, then section by section, clause by clause, phrase by phrase and word by word.

The same principle has been reiterated in Deewan Singh and others v. Rajendra Prasad Ardevi and others 35 and Sarabjit Rick Singh v. Union of India. 36 Applying the doctrine of strict construction, the courts have held that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the Section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its

reputation. There can be situations when the corporate reputation is affected when a director is indicted.\textsuperscript{37}

In view of the aforesaid analysis, the irresistible conclusion that is forthcoming is that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself.

6.5 Specific Averments to be Raised in the Complaint

The most important question which requires to be discerned in the context of section 141 of the Act is whether for purposes of Section of the Negotiable Instruments Act, 1881, it is sufficient if the substance of the allegation read as a whole fulfill the requirements of the said section and it is not necessary to specifically state in the complaint that the person accused was in charge of, or responsible for, the conduct of the business of the company. In this regard the decisions rendered by the various High Courts as well as the Supreme Court are unanimous to the effect that it is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That the respondent falls within the

\textsuperscript{37}Ibid.
parameters of Section 141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141, he would issue the process. We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non-director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial.\textsuperscript{38}

Three-Judge Bench in \textit{S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and another}\textsuperscript{39} referred to Section 138 and 141 of the Act, Sections 203 and 204 of Cr.P.C. and observed that a complaint must contain material to enable the Magistrate to make up his mind for issuing process and if this were not the requirement, consequences would be far-reaching. If a Magistrate has to issue process in every case, the burden of work before the Magistrate as well as the harassment caused to the respondents to whom process has to be issued would be tremendous. It has been observed therein that Section 204 of the Cr.P.C. commences with the words "if in the opinion of the Magistrate taking cognizance of an offence there is sufficient ground for proceeding" and that apart, the words "sufficient ground for proceeding" again suggest that ground should be made out in the complaint for proceeding against the respondent. The three-Judge Bench has ruled that it is settled law that at the time of issuing of the process, the Magistrate is required to see only the allegations in the complaint and where the allegations in the complaint or the charge-sheet do not constitute an offence against a person, the complaint is liable to be dismissed.

As far as the officers responsible for conducting the affairs of the company are concerned, the Court referred to various provisions of

\textsuperscript{38} \textit{Supra} Note 1, at 745.  
\textsuperscript{39} 2005(4) RCR (Criminal) 141.
the Companies Act, 1956 and analysed Section 141 of the Act to lay
down as follows:-

"What is required is that the persons who are sought
to be made criminally liable under Section 141 should be, at the time the offence was committed, in
charge of and responsible to the company for the
conduct of the business of the company. Every
person connected with the company shall not fall
within the ambit of the provision. It is only those
persons who were in charge of and responsible for
the conduct of business of the company at the time of
commission of an offence, who will be liable for
criminal action. It follows from this that if a
director of a company who was not in charge of and
was not responsible for the conduct of the business
of the company at the relevant time, will not be
liable under the provision. The liability arises
from being in charge of and responsible for the conduct
of business of the company at the relevant time when
the offence was committed and not on the basis of
merely holding a designation or office in a company.
Conversely, a person not holding any office or
designation in a company may be liable if he
satisfies the main requirement of being in charge of
and responsible for the conduct of business of a
company at the relevant time. Liability depends on
the role one plays in the affairs of a company and
not on designation or status. If being a director or
manager or secretary was enough to cast criminal
liability, the section would have said so. Instead of
"every person" the section would have said "every
director, manager or secretary in a company is
liable"..., etc. The legislature is aware that it is a
case of criminal liability which means serious
consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action. “

6.5.1 Liability of Director on the Date of Offence

Further, the liability of a Director must be determined on the date on which the offence is committed. Only because a Director was a party to a purported resolution by itself does not lead to an inference that he was actively associated with the management of the affairs of the Company. There may be a large number of Directors but some of them may not associate themselves in the management of the day-to-day affairs of the Company and, thus, are not responsible for conduct of the business of the Company. The averments must state that the person who is vicariously liable for commission of the offence of the Company both was incharge of and was responsible for the conduct of the business of the company. Requirements laid down therein must be read conjointly and not disjunctively. When a legal fiction is raised, the ingredients thereof must be satisfied.41

The Honble Gujarat High Court in Urban Co-op Credit Society Borsad v. State of Gujarat and another,42 wherein it has been categorically held that if a post dated cheque was issued by an officer of the company who resigned before the due date then he cannot be treated to be an officer responsible for the management of the company on the date on which the offence can be said to have been committed.

Any person who negotiated the complainant to take loan could not be held vicariously liable and it would not give rise to any inference that such person was responsible for day-to-day affairs of the company.43

40 Ibid.
41 Ibid.
42 2004(1) RCR Criminal 63.
43 K.Srikant Singh v. M/s North East Securities Ltd. and another, 2007(3) RCR (Criminal) 935 SC.
6.5.1.1 Clear Statement of the Fact

This aspect of the matter has recently been considered by this Court in *Sabitha Ramamurthy and another v. R.B.S. Channabasavardhya*,\(^4^4\) wherein it has been held:

"It may be true that it is not necessary for the complainant to specifically reproduce the wordings of the section but what is required is a clear statement of fact so as to enable the court to arrive at a prima facie opinion that the accused are vicariously liable. Section 141 raises a legal fiction. By reason of the said provision, a person although is not personally liable for commission of such an offence would be vicariously liable therefor. Such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned only if the requisite statements, which are required to be averred in the complaint petition, are made so as to make the accused therein vicariously liable for the offence committed by the company. Before a person can be made vicariously liable, strict compliance of the statutory requirements would be insisted."

In *Standard Chartered Bank v. State of Maharashtra*,\(^4^5\) the position under Section 141 of the Act has been summarised 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

\(^{4^4}\) 2006(3) Apex Criminal 282.
\(^{4^5}\) 2016(2) Apex Court Judgments (SC) 148.
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 allegation 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 sub-section (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 clauses (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 be 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 sub-section.

iv. Other officers of a company cannot be made liable under sub-section (1) of Section 141. Other officers of a company can be made liable only under sub-
section (2) of Section 141, byaverring in the complaint their position and duties in the company and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence.

6.5.1.2 Effect of Absence of Necessary Averments

Even, if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and or the managing directors or joint managing director who admittedly would be in charge of the company and responsible to the company for conduct of its business could be proceeded against? The answer to this question has to be in the affirmative. The question notes that the managing director or joint managing director would be admittedly in charge of the company and responsible to the company for the conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as managing director or joint managing director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as the signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141.46

6.5.1.3 No Deemed Liability of Director

In this perspective it may also required to be discerned as to whether a director of a company would be deemed to be in charge of, and responsible to, the company for conduct of the business of the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary. The answer to the question posed above has to be in the negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and

46 Supra Note 38.
responsible to the company for the conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.\(^\text{47}\)

Section 141 of the Act does not say that a Director of a Company shall automatically be vicariously liable for commission of an offence on behalf of the Company. What is necessary is that sufficient averments should be made to show that the person who is sought to be proceeded against on the premise of his being vicariously liable for commission of an offence by the Company must be incharge and shall also be responsible to the Company for the conduct of its business.\(^\text{48}\)

A reference to sub-section (2) of Section 141 fortifies the above reasoning because sub-section (2) envisages direct involvement of any director, manager, secretary or other officer of a company in the commission of an offence. This section operates when in a trial it is proved that the offence has been committed with the consent or connivance or is attributable to neglect on the part of any of the holders of these offices in a company. In such a case, such persons are to be held liable. Provision has been made for directors, managers, secretaries and other officers of a company to cover them in cases of their proved involvement.\(^\text{49}\)

The conclusion is inevitable that the liability arises on account of conduct, act or omission on the part of a person and not merely on account of holding an office or a position in a company. Therefore, in order to bring a case within Section 141 of the Act the complaint must disclose the necessary facts which make a person liable.

6.6 **Notice To Directors**

On a plain reading of Section 138(b) of the Act, it is seen that when a cheque presented to a bank is dishonoured, the payee or the

\(^{47}\) Ibid.

\(^{48}\) Ibid.

\(^{49}\) 2005(8) SCC 89.
holder in due course of the said cheque can make a demand for payment of the said amount of money by giving a notice in writing to the drawer of the cheque. In spite of the receipt of the said notice, if the drawer of the cheque fails to make payment of the said amount of money to the payee or as the case may be to the holder in due course of the cheque, he shall be deemed to have committed an offence. Therefore, when the drawer of a cheque is an individual who has been issued with the notice of dishonour of the cheque with a demand for making such payment issued under Section 138(b) of the Act, and fails to make the payment of the said amount of money either to the payee or to the holder in due course he shall be deemed to have committed the offence. However, when the offence is committed by a company, and by virtue of Section 141, 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, whether issue of notice to the company alone is sufficient, is to be considered. In the case of an offence committed by a company, the cheque is drawn by a person who is in charge of the company on behalf of the company. Therefore, in order to make the company and the drawer of the cheque liable for the offence, a notice is necessarily to be issued to the company as well as the drawer of the cheque on behalf of the company as per Section 138(b) of the Act.  

The next question to be considered and decided is that when a presumption of guilt could be drawn against every person who at the time the offence is committed, was in charge of and was responsible to the company for the conduct of the business of the company, whether such notices should be issued to such directors of the company also. It is no doubt true that Section 138(b) speaks of issuance of notice to the drawer of the cheque only. While interpreting the said section it is to be presumed that unless a notice is issued to the drawer of the cheque

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50 Harish C. Chadda v. XS Financial Services Limited, 2002(2) BC 720.
under Section 138(b) and in spite of the receipt of such notice the
drawer of the cheque fails to make the payment of the amount of money
covered under the cheque to the payee or the holder in due course
within 15 days of the receipt of the said notice, the offence is deemed
to have been committed. For the purpose of the cause of action for
prosecuting the drawer of the cheque, a notice under Section 138(b) is
mandatory. In this context, it is to be borne in mind that the cause of
action for prosecuting either the company or its directors, a notice as
contemplated under Section 138(b) is absolutely necessary. On the
other hand while reading Section 138(b) read with Section 141 of the
Act, it is to be considered whether the cause of action for the offence
against a director who has not been put on notice of dishonour of
cheques with a demand to make the payment of the amount covered
under the cheque within 15 days, could also be prosecuted for the
offence. Section 141 of the Act of course makes a director guilty of the
offence and liable to be proceeded against as if he has committed the
offence under Section 138 of the Act when the offence is committed by
a company. However, whether such a prosecution could be launched
without there being a cause of action arising against such director as
having committed the offence in the absence of any opportunity given
to him personally in regard to the dishonour of cheque with consequent
demand of payment of money covered under the cheque.\textsuperscript{51}

\textbf{6.6.1 Why is Issuance of Notice to Directors Important}

The matter has to be seen from the point of the punishment that
could be imposed on such director for the offence committed by the
company. Of course, when a company is found guilty for an offence
under Section 138 of the Act, it could be convicted and be punished
with a fine which may extend to twice the amount of the cheque.
However, the company by itself cannot be punished with imprisonment
for a term as contained under Section 138 of the Act which may extend
to one year, and such punishment of imprisonment could be imposed

\textsuperscript{51}Ibid.
only as against the directors. When a director is presumably made guilty of the offence committed by the company by virtue of Section 141 of the Act, whether he should be sentenced to imprisonment and whether his personal liberty can be curtailed without any opportunity being given to him for compliance with the demand under the notice. If the matter is looked at from this point, the issuance of notice to the director of the company assumes importance. Of course under Section 141 every person who at the time the offence was committed, was in charge of and was responsible for the company for the conduct of the business of the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. The said presumption of guilt arises only when a notice is served under Section 138(b) of the Act calling upon such person to honour the notice by making payment. Only in the event of failure to make payment within 15 days from the receipt of the notice, does the cause of action for prosecuting such director arise. Of course in the case of a cheque issued by an individual being dishonoured and non-compliance with the demand despite notice under Section 138(b), it is presumed that such drawer of the cheque is said to have committed the offence. However, without the knowledge of dishonour of cheque and without an opportunity to arrange for payment of the amounts covered under the cheque within 15 days of the date of receipt of the notice can it be called that the director who has not been served with the notice can be proceeded against and punished for imprisonment merely because he happens to be a director and is presumed to be guilty when the offence is committed by the company.52

In this connection, it is relevant to note the proviso to Section 141 which states that "provided nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed with his knowledge, or that he had exercised all due diligence to prevent the commission of such offence". The proviso to Section 141 assumes more significance with regard to the service of

52 Ibid.
notice to the individuals including the directors as there is a presumption of guilt and a liability to be proceeded against and punished for imprisonment. When such notice is not given to a director it can be very well contended by such director that the offence was committed without his knowledge and in the absence of such knowledge he could not exercise all due diligence to prevent the commission of the offence. Therefore, in the absence of any notice to the individual director, it cannot be said that a cause of action has arisen to prosecute the said director also for the offence. Presumption of guilt and liability to be proceeded against and punished is one thing. Before proceeding against such person, it is incumbent on the complainant to put such person on notice and in the absence of such notice it cannot be considered that the cause of action arises against such person for being prosecuted. Section 138(b) refers to issuance of notices to the drawer. Of course, while interpreting the said Section, notice to the drawer shall mean notice to the drawer who has drawn the cheque in individual cases. However, when the offence is committed by a company and by virtue of Section 141 of the Act 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 are presumed to be guilty of the offence, the word "drawer" as contained in Section 138(b) cannot be restricted in the sense to the drawer of the cheque alone but also to those who are presumed to be guilty of the offence by virtue of Section 141 when more particularly such individuals are liable to be imprisoned for such offence and their personal liberty is infringed thereon. Therefore, when the offence is committed by a company and by virtue of Section 141 of the Act 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, are presumed to be guilty of the offence, those persons shall also be entitled to the notice under Section 138(b) of the Act. In the absence of such notice there cannot be a cause of action against those directors as they had no knowledge of the offence and there was no opportunity for them to exercise all due diligence to prevent the
commission of such offence.\textsuperscript{53}

The Division Bench of Madras High Court in \textit{B. Raman \& Ors. v. M/s. Shasun Chemicals and Drugs Ltd.}\textsuperscript{54} again observed that statutory notice under Section 138 of the Act was required to be issued to every Director and for non-compliance of such mandatory requirement respondents 1 and 2 could not be proceeded against. While holding so, the Court opined that under Section 141 (1), the persons in charge of and responsible to the Company shall be deemed to have committed the offence. Under sub section (2), even the persons, who are not stated to be in charge of and responsible to the Company, can be prosecuted, if it is alleged and proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of any of those persons prosecuted. So, these Sections would provide that when there are Directors, who are responsible for the conduct of the business of the Company, and when there are other officers, with whose consent the offence has been committed, the complainant shall make averments to the said effect.

In that context, the complainant has to start the process of getting back the cheque amount from those persons, who represent the Company, in order to avoid the filing of the Complaint against them. In the said process, he has to necessarily make a demand from those persons, who are part and parcel of the drawer. Only when the process fails, the cause of action, as envisaged in Section 138, would arise against them, to enable the complainant to approach the Court, within the stipulated time. So, the starting of the process is, the service of notice on the persons, who represent the Company, the drawer of the cheque.\textsuperscript{55}

The object of the notice is to give a chance to the drawer of the cheque to rectify his omission and also to protect an honest drawer. Service of notice of demand in Clause (b) of the proviso to Section 138

\textsuperscript{53} Ibid.
\textsuperscript{54} 2007(1) RCR (Criminal) 119.
\textsuperscript{55} Ibid.
is a condition precedent for filing a complaint under Section 138. 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. Some may reply that they are not in charge of and responsible for the conduct of the business of the Company. Some may reply that they are not connected with the Company in any way and some may rectify the omission, by making efforts to pay the amount to the payee, in the name of the Company, in that event, the complainant may either drop the action of filing the Complainant or, in the event of non-payment of the cheque amount, he may choose the persons, who are really responsible for the commission of offence and, then, initiate prosecution against them.\textsuperscript{56}

\textbf{6.6.2.1 Dissenting View}

However the Calcutta High Court in the case of \textit{Girish Chandra Pandey v. Kanhaiyalal Chandak and Ors.},\textsuperscript{57} held that if the partnership 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. Even in the decision rendered by a Single Judge of Delhi High Court it was laid down that Section 141 of the Act does not require that each and every partner of the firm is required to be issued notice.\textsuperscript{58}

Similar view was taken by High Court of Andhra Pradesh in \textit{K. Pannir Selvan v. MMTC and another}\textsuperscript{59} and by Delhi High Court in \textit{Ranjit Tiwari v. Narender Nayyar}.\textsuperscript{60} However, the point as to the cause of action for the offence as well as the knowledge to the individual person of commission of offence and in the absence of such knowledge there was no opportunity for them to exercise all due diligence to prevent the commission of such offence, has not been either canvassed, argued, considered or decided in those judgments.

Finally in the Supreme Court laid the controversy to rest by holding that in case of dishonour of cheque issued by a Company, there is no requirement of giving separate notice to Directors individually. The Apex Court went on to discuss that since the High Court has read into Section 138 of the Act the requirement that separate notices ought to be given to the directors, without which they cannot be made vicariously liable, the principles concerning interpretative function of the Court may be adverted to.\textsuperscript{61}

6.6.2.2 Interpretation of Statute

In \textit{Kanai Lal Sur v. Paramnidhi Sadhukhan},\textsuperscript{62} it was observed:

"In support of his argument Mr. Chatterjee has naturally relied on the observations made by Barons of the Exchequer in Heydon's case. Indeed these observations have been so frequently cited with approval by courts administering provisions of welfare enactments that they have now attained the status of a classic on the subject and their validity cannot be challenged. However, in applying these observations to the provisions of any statute, it must always be borne in mind that the first and primary rule of construction is that the intention of the Legislature must be found in the words used by the Legislature itself. If the words used are capable of one construction only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act. The words used in the material provisions of the statute must be interpreted in their plain grammatical meaning and

\textsuperscript{61} Kirshna Texport & Capital Markets Ltd. v. Ila A. Agrawal, 2015(8) SCC 28.
\textsuperscript{62} (1958) SCR 360.
it is only when such words are capable of two constructions that the question of giving effect to the policy or object of the Act can legitimately arise. When the material words are capable of two constructions, one of which is likely to defeat or impair the policy of the Act whilst the other construction is likely to assist the achievement of the said policy, then the courts would prefer to adopt the latter construction. It is only in such cases that it becomes relevant to consider the mischief and defect which the Act purports to remedy and correct."

In Nasiruddin and others v. Sita Ram Agarwal,63 the Apex Court stated the law in the following terms:

_The court's jurisdiction to interpret a statute can be invoked when the same is ambiguous. It is well known that in a given case the court can iron out the fabric but it cannot change the texture of the fabric. It cannot enlarge the scope of legislation or intention when the language of the provision is plain and unambiguous. It cannot add or subtract words to a statute or read something into it which is not there. It cannot rewrite or recast legislation. It is also necessary to determine that there exists a presumption that the legislature has not used any superfluous words. It is well settled that the real intention of the legislation must be gathered from the language used....."

In Nathi Devi v. Radha Devi Gupta,64 a Constitution Bench of the Apex Court observed:

"The interpretative function of the court is to

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63 2003(1) RCR (Rent) 337.
64 2005(1) RCR (Civil) 631.
discover the true legislative intent. It is trite that in interpreting a statute the court must, if the words are clear, plain, unambiguous and reasonably susceptible to only one meaning, give to the words that meaning, irrespective of the consequences. Those words must be expounded in their natural and ordinary sense. When the language is plain and unambiguous and admits of only one meaning, no question of construction of statute arises, for the Act speaks for itself. Courts are not concerned with the policy involved or that the results are injurious or otherwise, which may follow from giving effect to the language used. If the words used are capable of one construction only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. In considering whether there is ambiguity, the court must look at the statute as a whole and consider the appropriateness of the meaning in a particular context avoiding absurdity and inconsistencies or unreasonableness which may render the statute unconstitutional."

With these principles in mind, we now consider the provisions in question. 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 said Section such person shall be deemed to have committed an offence. The proviso to the Section stipulates three conditions on the satisfaction of which the offence is said to be completed. The proviso inter alia obliges the payee to make a demand for the payment of said amount of money by giving a notice in writing to "the drawer of the cheque" and if "the drawer of the cheque" fails to make the payment of the said amount within 15 days of the receipt of
said notice, the stages stipulated in the proviso stand fulfilled. The notice under Section 138 is required to be given to "the drawer" of the cheque so as to give the drawer an opportunity to make the payment and escape the penal consequences. No other person is contemplated by Section 138 as being entitled to be issued such notice. The plain language of Section 138 is very clear and leaves no room for any doubt or ambiguity. There is nothing in Section 138 which may even remotely suggest issuance of notice to anyone other than the drawer.  

Section 141 states that if the person committing an offence under Section 138 is a Company, every director of such Company who was in charge of and responsible to that Company for conduct of its business shall also be deemed to be guilty. The reason for creating vicarious liability is plainly that a juristic entity i.e. a Company would be run by living persons who are in charge of its affairs and who guide the actions of that Company and that if such juristic entity is guilty, those who were so responsible for its affairs and who guided actions of such juristic entity must be held responsible and ought to be proceeded against. Section 141 again does not lay down any requirement that in such eventuality the directors must individually be issued separate notices under Section 138. The persons who are in charge of the affairs of the Company and running its affairs must naturally be aware of the notice of demand under Section 138 of the Act issued to such Company. It is precisely for this reason that no notice is additionally contemplated to be given to such directors. The opportunity to the 'drawer' Company is considered good enough for those who are in charge of the affairs of such Company. If it is their case that the offence was committed without their knowledge or that they had exercised due diligence to prevent such commission, it would be a matter of defence to be considered at the appropriate stage in the trial and certainly not at the stage of notice under Section 138.  

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65 Supra Note 60.
66 Ibid.
If the requirement that such individual notices to the directors must additionally be given is read into the concerned provisions, it will not only be against the plain meaning and construction of the provision but will make the remedy under Section 138 wholly cumbersome. In a given case the ordinary lapse or negligence on part of the Company could easily be rectified and amends could be made upon receipt of a notice under Section 138 by the Company. It would be unnecessary at that point to issue notices to all the directors, whose names the payee may not even be aware of at that stage. Under Second proviso to Section 138, the notice of demand has to be made within 30 days of the dishonour of cheque and the third proviso gives 15 days time to the drawer to make the payment of the amount and escape the penal consequences. Under clause (a) of Section 142, the complaint must be filed within one month of the date on which the cause of action arises under the third proviso to Section 138. Thus a complaint can be filed within the aggregate period of seventy five days from the dishonour, by which time a complainant can gather requisite information as regards names and other details as to who were in charge of and how they were responsible for the affairs of the Company. But if we accept the logic that has weighed with the High Court in the present case, such period gets reduced to 30 days only. Furthermore, unlike proviso to clause (b) of Section 142 of the Act, such period is non-extendable. The summary remedy created for the benefit of a drawee of a dishonoured cheque will thus be rendered completely cumbersome and capable of getting frustrated.67

Section 138 of the Act does not admit of any necessity or scope for reading into it the requirement that the directors of the Company in question must also be issued individual notices under Section 138 of the Act. Such directors who are in charge of affairs of the Company and responsible for the affairs of the Company would be aware of the receipt of notice by the Company under Section 138. Therefore neither on literal construction nor on the touch stone of purposive construction

67 Ibid.
such requirement could or ought to be read into Section 138 of the Act. Concluding so, the Apex Court stated that the decision of the Division Bench of the Madras High Court in *B. Raman & Ors. v. M/s. Shasun Chemicals and Drugs Ltd.* was incorrect and it stands overruled.

6.7 Effect of Winding up of Company

Another question, which falls for consideration, is as to whether a complaint under Section of the Negotiable Instruments Act can be filed against the company and/or its Managing Director/Director after the winding up of the said company. When the complaint is filed against a company prior to the winding up of the company and during the pendency of such a complaint under Section 138 of the Negotiable Instruments Act and the company is ordered to be wound up, the complaint against the company cannot proceed without the permission of the Company Judge of the High Court which ordered winding up. Reason is simple. A fortiori, the complaint under Section 138 cannot be filed against the company which is already wound up on the date when the cheque was dishonoured and notice of dishonour of the cheque was given. Whereas on date of presentation of the cheque and filing of complaint, the company was in liquidation, in fact, the company was ordered to be wound up at the instance of the complainant who had filed company petition for winding up, it is the Official Liquidator only who could represent the company. Proceedings are clearly not maintainable against the company as the money payable to the complainant after the winding up of the company was a 'debt' which could be recovered by the complainant only in accordance with the provisions of Companies Act.

The next question for consideration is as to whether the complaint is maintainable against the Directors. If the complaint was filed prior to the winding up orders passed against the company, even if the company is to be dropped from the proceedings after the winding

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68 Supra Note 54.
up orders are passed, such criminal proceedings can continue against the Directors. That is the legal position settled by the Supreme Court in the case of *Anil Hada v. Indian Acrylic Ltd.*\(^7^0\) In this case the Court held that offender under Section of the Negotiable Instruments Act is the drawer of the cheque which alone would have been the offender thereunder, if the Act did not contain other provisions. Therefore, normally, in the case of a company incorporated under the Companies Act it is the company which would be the offender. However, by virtue of Section 141 of the Act, penal liability under Section 138 is cast upon other persons connected with the company. Therefore, those persons also become liable for penal action in addition to the company. It further held that if the offence is committed by a company it can be punished only if the company is prosecuted. However, if, instead of prosecuting the company, a payee opts to prosecute other persons falling within the description of Section 141, it is permissible for him to do so. Three categories of persons can be discerned from the said provision who are brought within the purview of the penal liability through the legal fiction envisaged in the section. They are: (1) The company which committed the offence. (2) Everyone who was in-charge of and was responsible for the business of the company, (3) Any other person who is a director or a manager or a secretary or officer of the company, with whose connivance or due to whose neglect the company has committed the offence.\(^7^1\)

Normally an offence can be committed by human beings who are natural persons. Such offence can be tried according to the procedure established by law. But there are offences which could be attributed to juristic persons also. If the drawer of a cheque happens to be a juristic person like a body corporate if can be prosecuted for the offence under Section 138 of the Act. Now there is no scope for doubt regarding that aspect in view of the clear language employed in Section 141 of the Act. In the expanded ambit of the word 'company' even firms or any

\(^7^0\) *Supra* Note 18.  
\(^7^1\) *Ibid.*
other associations of persons are included and as a necessary adjunct thereof a partner of the firm is treated as director of that company.\(^\text{72}\)

Thus when the drawer of the cheque who falls within the ambit of Section 138 of the Act is a human being or a body corporate or even firm, prosecution proceedings can be initiated against such drawer. In this context the phrase 'as well as' used in sub-section (1) of Section 141 of the Act has some importance. The said phrase would embroil the persons mentioned in the first category within the tentacles of the offence on a par with the offending company. Similarly the words 'shall also' in sub-section (2) are capable of bringing the third category of persons additionally within the dragnet of the offence on an equal part. The effect of reading Section 141 is that when the company is the drawer of the cheque such company is the principal offender under Section 138 of the Act and the remaining persons are made offenders by virtue of the legal fiction created by the Legislatures as per the section. Hence, the actual offence should have been committed by the company and then alone the other two categories of persons can also become liable for the offence.\(^\text{73}\)

If the offence was committed by a Company it can be punished only if the company is prosecuted. But instead of prosecuting the company if a payee opts to prosecute only the persons falling within the second or third category the payee can succeed in the case only if he succeeds in showing that the offence was actually committed by the Company. In such a prosecution the accused can show that the company has not committed the offence, though such company is not made an accused, and hence the prosecuted accused is not liable to be punished. The provisions do not contain a condition that prosecution of the company is sine qua non for prosecution of the other persons who fall within the second and the third categories mentioned above. No doubt the Company is sine qua non for convicting those other persons. But if a company is not prosecuted due to any legal snag or otherwise, the

\(^{72}\) Ibid.
\(^{73}\) Ibid.
other prosecuted persons cannot, on that score alone, escape from the penal liability created through the legal fiction envisaged in Section 141 of the Act.\textsuperscript{74}

The Court also noted the provisions of Section 139 of the Act which draws a legal presumption in favour of holder, namely, to the effect that the holder of a cheque received the cheque of the nature referred under Section 138 of the Act in discharge, in whole or in part, of any debt or any other liability and held that such a presumption mentioned in this Section would operate not only against the drawer but against other persons who can be roped in by virtue of Section 141 of the Act. The liability of the company as well as Directors under the Negotiable Instruments Act would remain if the cheque is presented after the winding up petition is filed and is pending but the orders of winding up have not been passed.\textsuperscript{75}

This proposition stands concluded by the judgment of the Supreme Court in the case of \textit{Pankaj Mehra and Anr. v. State of Maharashtra and Ors.}\textsuperscript{76} The question which was posed for determination in the said case was 'can a company escape from penal liability under Section of the Negotiable Instruments Act (for short 'the Negotiable Instruments Act') on the premise that a petition for winding up of the company has been presented and was pending during the relevant time?' The cases decided in the said judgment were those where winding up petition was filed sometime in the year 1996. Cheques presented were dishonoured and in the year 1997 complaint was filed and in the year 1998 winding up orders were passed and official liquidator was appointed. Submission on behalf of company and the Directors who were made accused in complaint under Section of the Negotiable Instruments Act was that once the winding up orders are passed though after the complaint was filed but in a winding up petition filed earlier, the winding up orders would relate back to the date of filing of the petition by virtue of Section (2) of the Companies

\textsuperscript{74} ibid.
\textsuperscript{75} ibid.
\textsuperscript{76} 1(2000) BC 281 (SC).
Act. Therefore, on this premise it was submitted that effect of winding up orders would be from 1996 i.e., the date when winding up petition was presented. The necessary consequence, according to them was that after the filing of the winding up petition there could not have been any disposition of the property of the company as Section (2) of the Companies Act stipulates that any disposition of the property of the company shall be void if it was made after the commencement of the winding up proceedings. This contention was negated by the Supreme Court holding that mere filing of the winding up petition would not attract the provisions of Section (2) of the Companies Act. It was held that after the filing of the winding up petition, a Company Court could still refuse to wind up the company and, therefore, mere presenting of the winding up petition was not necessary concomitant that the winding up would follow. It was further held that Section (2) of the Companies Act had to be given purposive interpretation. If Section 536 (2) is to be interpreted by holding that all payments made from the date of filing of the petition till the date of passing of winding up orders, are to be treated as void, then it would lead to disastrous consequence and it may become difficult for the company to do its business merely because winding up petition is filed.\textsuperscript{77}

This position is succinctly stated in para 20 of the judgment which reads as under\textsuperscript{78}:

"20. It is difficult to lay down that all dispositions of property made by a company during the interregnum between the presentation of a petition for winding up and the passing of the order for winding up would be null and void. If such a view is taken the business of the company would be paralysed, for, the company may have to deal with very many day-to-day transactions, made payments of salary to the staff and other employees and meet

\textsuperscript{77} Ibid.
\textsuperscript{78} Ibid.
urgent contingencies. An interpretation which could lead to such a catastrophic situation should be averted. That apart, if any such view is adopted, a fraudulent company can deceive any Bonafide person transacting business with the company by stage-managing a petition to be presented for winding up in order to defeat such Bonafide customers. This consequence has been correctly voiced by the Division Bench in the impugned judgment.

From the aforesaid discussion, the two propositions, which can be culled out are as under:

A. When the complaint under the Negotiable Instruments Act is filed against the company and its Directors and during the pendency of this complaint, orders of winding up of the company are passed, even if the complaint cannot continue against the company, the proceedings can still continue against the Directors.

B. If there is a winding up petition pending against a company in which no winding up order is passed, complaint under Section 138 would be maintainable against the company as well as its Directors as mere filing of the winding up petition would not be of any consequence. In such winding up petition even if winding up order is passed on a later point of time, namely, after the filing of the complaint under Section 138 of the Act, such a complaint can still continue.

There may also be a position where cheque presented is dishonoured and complaint is filed under Section 138 and 141 of the Negotiable Instruments Act against the company and the Directors after the company has already been ordered to be wound up. Whether such a complaint would be maintainable is the question and the legal position on this aspect is what needs to be determined. To answer this question,
we may have first to take note of the necessary legal consequences of the winding up of a company and orders of appointment of Official Liquidator/Liquidator. By operation of law, i.e., by virtue of the Companies Act, it would result in discharge of all the employees and the Officers from the service of the company including Board of Directors. Affairs of such a company are taken over by the Official Liquidator and the Official Liquidator has to disburse the payment in accordance with the Companies Act. Section 536 of the Companies Act now comes into play fully and disbursement of any amount would be void. If the cheque is presented at this stage, payment thereof is legally barred. Bank, on which cheque is issued is precluded from honouring the cheque. In the instant case itself, account was closed by the Official Liquidator and that was the reason for dishonour of cheque. It is also to be borne in kind that after the winding up orders and the taking of over the affairs of the company by the Official Liquidator since erstwhile Directors seize to be the Directors as on the date of presentation of the cheque, they are not incharge of day to day affairs of the company. Offence is committed under Section 138 of the Act only on the dishonour of the cheque and issuance of notice for demand to pay the amount. As on that date, no such notice could be issued to the company which was in liquidation and the creditors are now to be paid as per the scheme of the Companies Act. Therefore, liability on them also cannot be fastened under Section of the Negotiable Instruments Act.79

There is no provision in the Companies Act, which prohibits enforcement of the debt due from a company. When a company goes into liquidation, enforcement of debt due from the company is only made subject to the conditions prescribed therein. But that does not mean that the debt has become unenforceable altogether. Perhaps due to want of sufficient assets for the company the realisation of a debt would be difficult. But that is no premise to hold that the debt is legally unenforceable. Enforceability of a debt is not to be tested on

79 Supra Note 67.
the touchstone of the modality or the procedure provided for its realisation or recovery. Hence the contention that the special provision incorporated in the Companies Act regarding the debts and liabilities due from the company will render the debt unenforceable, cannot be accepted.  

However, it is also clarified that enforcement of a debt is subject to the conditions prescribed under the Companies Act. The Companies Act, particularly Chapter V, clearly lays down the manner in which debts of the company are to be discharged by the Official Liquidator from the funds/corpus available. There is a category of preferential creditors as mentioned in Sections 529A and 530 which are to be given preference over the other creditors. After payment of preferential creditors, if there is any money due, it is to be utilised for payment of statutory dues and governmental dues and only thereafter the turn of unsecured creditors comes. Therefore, obviously the debt does not become unenforceable, but at the same time it is payable only in accordance with Scheme of the Act.

Thus, what is emphasised is that actual offence has to be committed by the company and then alone the Directors can become liable for the offence. When the company goes into liquidation and the cheque is presented thereafter, it cannot be said that the company has committed the offence as it is because of legal bar that it is precluded from making the payment. Once dishonour of the cheque by the Bank and failure to make payment of amount by the company is beyond its control, the Directors (who are in fact ex-Directors) can also not be held liable. Sustenance for this proposition can be drawn from another judgment of the Supreme Court in the case of *Kusum Ingots and Alloys Ltd. v. Pennar Peterson Securities Ltd. and Ors.*  

That was a case where reference in respect of the company was pending before the Board of Industrial and Financial Reconstruction (for short 'BIFR') under the Sick Industrial Companies (Special Provisions) Act, 1985

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80 Ibid.
81 Ibid.
(SICA). The Court held that mere registering the reference would not be sufficient to bar the proceedings under Section 138 of the Negotiable Instruments Act even by virtue of Section 22 of SICA as Section 22 which provided that no proceedings would be instituted against the company related to only to civil proceedings and does not include criminal proceedings. However, the Court further held that position would be different if order is passed by the BIFR under Section 22A of SICA restraining the company or its Directors from disposing of the assets of the company.

The question that remains to be considered is whether Section 22-A of SICA affects a criminal case for an offence under Negotiable Instruments Act. In the said Section provision is made enabling the Board to make an order in writing to direct the sick industrial company not to dispose of, except with the consent of the Board, any of its assets-(a) during the period of preparation or consideration of the scheme under Section 18; and (b) during the period beginning with the recording of opinion by the Board for winding up of the company under Sub-section (1) of Section 20 and up to commencement of the proceedings relating to the winding up before the concerned High Court. This exercise of the power by the Board is conditioned by the prescription that the Board is of the opinion that such a direction is necessary in the interest of the sick industrial company or its creditors or shareholders or in the public interest. In a case in which the BIFR has submitted its report declaring a company as 'sick' and has also issued a direction under Section 22-A restraining the company or its directors not to dispose of any of its assets except with consent of the Board then the contention raised on behalf of the appellants that a criminal case for the alleged offence under Section Negotiable Instruments Act cannot be instituted during the period in which the restraint order passed by the BIFR remains operative cannot be rejected outright.\(^83\)

Whether the contention can be accepted or not will depend on the

\(^83\) Ibid.
facts and circumstances of the case. Take for instance, before the date on which the cheque was drawn or before expiry of the statutory period of 15 days after notice, a restraint order of the BIFR under section 22-A was passed against the company then it cannot be said that the offence under Section Negotiable Instruments Act was completed. In such a case it may reasonably be said that the dishonouring of the cheque by the bank and failure to make payment of the amount by the company and/or its Directors is for reasons beyond the control of the accused. It may also be contended that the amount claimed by the complainant is not recoverable from the assets of the company in view of the ban order passed by the BIFR. In such circumstances it would be unjust and unfair and against the intent and purpose of the statute to hold that the Directors should be compelled to face trial in a criminal case. Therefore, such a complaint would not be maintainable when the cheque is presented after the company has already been ordered to be wound up.84

84 Ibid.