

**Round Table on “vicarious liability
clause in various acts -hanging sword
on independent and nominee
directors”**

arranged by

Innovative Thought Forum

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Participants

- Justice (Retd) Kamal Mehta
- Ms Dharmishta Rawal
- Mr V V Angadi
- Mr Amal Dhruv
- Mr H M Siddhartha
- Mr Mahesh Gupta
- Mr Joel Evans
- Mr Sparsh Gupta
- Mr Anuj Agarwala
- Mr Malay Patel
- Mr Gaurang Divatia
- Mr Vishwas Tendulkar
- Prof Arun Kumar

Context

Vicarious liability clause in case of company (defined as a corporate, firm and association of persons) is there in virtually all the acts and follows a standard template. It aims to fasten liability on persons who were in charge and responsible for day to day operations (part 1 of the clause) as well as persons connected to the offence (part 2 of the clause).

Despite such a clarity in the clause, complainants include independent and nominee directors (Non executive directors) in the complaint and succeed in launching criminal cases due to casual or cursory approach of judiciary . This blatant misuse causes trouble and torture to non executive directors and persons for decades as criminal cases do not have time limit.

As evident from the clause in various acts it is very clear that it is put in every act in a mechanical manner

In NI act a special paragraph is added between sub section 141(1) and 141(2) that reads as under

- ✓ 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 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.

Important points for discussion

1. Meaning of company (whether to follow companies Act 2013 or something else)
2. Meaning of “every person “
3. Meaning of “in charge “
4. Meaning of “conduct of business “

5. Meaning of (3) and (4) together
6. Whether a non executive director or person can ever be considered as in charge and responsible for day to day business
7. The line of communication and control of non executive director in a company
8. Is the board ever given details of payments , day to day working , issuance of different cheques etc
9. Onus on judges
10. Plan to seek issuance of guidelines to Judiciary of India at all levels about anomalies and misinterpretations of the law
11. Roadmap to reform the clauses to bring clarity
12. Schedule for programmes in different cities and preparation of white paper for policy makers

Important points made

- Vicarious liability clause in two parts : first relating to persons who were in charge and responsible for conduct of business and second relating to persons who were not in charge but were abettors or colluders or collaborators in the said offences
- The term “in charge” applies to persons who are in day to day management of the company .IDs and NEDs (Nominee and non executive directors) can never be in charge.
- The clause is very wide as it covers all types of firms and association of persons. However in companies act 2013 need to show the names of managing, whole time or executive directors for conduct of the business of the company. Only in cases where no such distinction is made by the company in their report to MCA , all directors to be treated as operationally responsible
- In companies act 2013, Key managerial persons (KMPs) also defined and to be considered as responsible for the functional areas
- N I Act most discussed due to dishonour of cheque now a criminal offence under 138 and vicarious liability fastened under 141 on persons in case of a company that is a juristic person
- Supreme Court judgements demanding proper averments in complaints before issuance of summons to accused not followed by lower courts. Lack of knowledge and awareness of lower court judges combined with work pressure responsible for mechanical admission of flimsy and groundless complaints
- The term “every person” in the first part of the clause misinterpreted as “every director” in the complaints. A casual statement linking each director to day to day management and conduct of business of the company allowed by the judges as the basis of the complaint
- Unwarranted harassment and costs to innocent IDs and NEDs a big deterrent to qualified and experienced professionals to their becoming independent or nominee directors in the companies
- Criminal vicarious liability an exception in criminal law where both guilty mind and guilty action are prerequisites

- For ID and NED, communication with the company only through board meetings. Payments by cheques never a part of the board meetings that generally focus on strategic discussions. Dishonour of cheques that were never a part of board meetings or resolutions can never be attributed to ID and NED.
- Though NI act is predominant, IDs and NEDs implicated and accused under other acts to bring illegitimate mental pressure and torture
- Exemption given to nominee directors of government and public sector banks to be extended to nominee directors of the private banks and investors
- Essential to bring clarity on this issue through viable short term as well as long term measures
- Amendments to act appearing difficult and hence worthwhile urging judiciary to look at given do's and don't's while admitting cases of vicarious liability
- Many articles published demanding reform. One worthwhile article. <https://corporate.cyrilamarchandblogs.com/2020/11/vicarious-liability-of-non-executive-directors-a-case-for-reform-of-law/>

Way forward

- Arrange more interactive programmes in relevant centres in the country involving chambers, judiciary, judicial academies, policy makers, media, social media etc to highlight anomalies in interpretation of the vicarious liability clause
- Sensitise relevant government authorities to issue guidelines to judiciary to follow important advices and judgements of Supreme Court while admitting news cases as well as to adjudicate the pending cases
- Compilation of a check list of do's and don'ts that must be used by judges while admitting cases
- Seek clarifications or amendments in the current acts in respect of the terms "in charge" and "responsible for conduct of business"
- Preparation of white paper and policy document for the government on the subject