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When an under-construction power unit chimney at Balco's Korba plant came crashing down in November 2009 killing 45 people and injuring several others, subsequent investigations pinned the blame on three mid-level executives. The directors on Balco's board did not find a place in the police chargesheet.

In the recent oil spill accident by US major BP in the Gulf of Mexico, the company's liability, which is still being decided, is being guided by an industry legislation that fixes the limit on the amount of damages that the company can pay. However, this limit may not apply if it's proven that the accident was due to gross negligence.

The focus on the extent of liability of non-executive directors is sure to intensify after a trial court in Bhopal on Monday, convicted seven officials of Union Carbide India, including chairman Keshub Mahindra, on charges of death by negligence for their involvement in the gas tragedy that left about 15,000 people dead, more than a quarter of a century ago.

In all such industrial disasters, investigating authorities have considered it vital to determine whether the officials involved in the company were negligent, irrespective of their nature of their functions. Liability arises if a person is in charge when the incident happened, say legal experts.

"In India, there is no distinction between an executive and a non-executive director," says Suhail Nathani, a partner at Mumbai-based law firm Economic Laws Practice. "That (the difference) has emerged through jurisprudence," he added.

Industrial disaster cases have fortunately been rare in India. However, the Supreme Court and a number of high courts have ruled on the liability of directors, both executive and non-executive, in cases related to the bouncing of cheques. While the situations are obviously not comparable, these judicial pronouncements do set guidelines on liabilities of directors.

In the KK Ahuja versus VK Vora case, the Supreme Court observed that to be liable, a person should fulfill the legal requirement of being a person in law, responsible for the conduct of the business of the company. He should also be in charge of the business of the company. The law lists such persons as managing directors, whole-time directors, managers, company secretaries; but there is no mention of non-executive directors.

"For a certain kind of prosecutions, to the extent that a managing director or executive director is designated and in charge of affairs of the company and that a non-executive director can prove that he was not involved in the day-to-day operations of a company and that he has taken positive steps to avoid the occurrence of any incident, he may not be directly held for gross negligence," says Vyapak Desai, head of international litigation and dispute resolution practice at Nishith Desai Associates.

The apex court has provided a two-pronged test to examine whether a person can be deemed responsible. The first is a legal, statute-based test where it has to be proved that the person is responsible for the conduct of the business of the company.

The second is a fact-based test, where through specific instances, the complainant has to allege that the accused was in control of the day-to-day business. If a person does not satisfy the first test, neither is he required to meet the second test nor can he be held liable.

In the SMS Pharmaceuticals versus Neeta Bhalla case, the Delhi High Court said liability depends on the role that the person plays in the company and not on the designation or status.

The liability arises from being in charge of the business of the company when the offence was committed. Conversely, a person not holding any office in a company may be liable if he satisfies the main requirement of being in charge of and responsible for conduct of business of the company at the relevant time.

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