

Dispute Resolution Hotline

September 16, 2009

EX-DIRECTORS LIABLE TO FACE TRIAL

In *Suhas Bhand Vs. The State of Maharashtra & Anr. and Amul Urdhwareshe Vs. The State of Maharashtra & Anr.*¹, the division bench of the Bombay High Court (“**Court**”) considered and set out various instances where even an ex – director of a company would not be discharged and would therefore need to face proceedings in a criminal complaint filed for dishonor of cheque under Sections 138 and 141 of the Negotiable Instruments Act (“**Act**”).

FACTS OF THE CASE

Enbee Infrastructure Limited (“**Company**”) obtained a loan from *Housing and Urban Development Corporation* (“**HUDCO**”). The petitioners i.e. *Suhas Bhand and Amul Urdhwareshe* (“**Petitioners**”) were the Directors of the Company. The loan agreement was entered into between the Company and HUDCO on 29.12.1999. The loan agreement was signed by one of the petitioners. Pursuant to obtaining the loan, the Company through its Director/ authorized signatory issued several post dated cheques (“**PDCs**”) in favor of HUDCO. Some of the cheques were dishonoured. HUDCO filed a complaint under section 138 and 141 of the Act wherein the Company and directors of the Company, including the petitioners, were made the accused.

The Petitioners filed an application in the Court for quashing of the complaint against them on the ground that they had resigned as Directors prior to the dishonor of the cheques. They produced a certified copy of *Form 32*² issued by Registrar of Companies (“**ROC**”) in support of their contention. It was the case of the petitioners that since they had resigned prior to the dishonor of the cheques, they were not the persons in *control* and *management* of the Company at the time the cheques were dishonoured (See our earlier hotline dated May 05, 2009) The Petitioners, therefore, prayed for quashing of the proceedings against them.

Refuting the factum of their resignation, HUDCO contended that the Petitioners had continued to act as Directors and were in control of the management of the Company. Interestingly, HUDCO also produced a letter which had been signed by one of the Petitioners in his capacity as Director of the Company on September 03, 2001 (“**Letter**”), which was after the dishonor of the cheques.

JUDGMENT OF THE COURT

The Court, *inter alia*, noted that if a person is no longer the Director at the time the actual liability is incurred, he may not be liable to face proceedings in a complaint filed under section 138 read with section 141 of the Act. However, the Court observed that each case had to be seen on its own merit.

Accordingly, the Court observed that a Director, who enters into a transaction on behalf of his company and takes a loan from a financial institution, incurs the liability for repayment of the loan on the date of the transaction itself. The Court further observed that liability having being incurred on the date of the transaction itself, it would be for such Director to lead evidence to show that he has resigned if his resignation is called in question.

In the instant case, the Petitioners had only produced certified copy of Form 32 as issued by the ROC as proof of their resignation. The Court observed that under Section 79 of the Indian Evidence Act, the presumption of genuineness of a certified copy extends only to the fact that such private document was filed in a public office and such presumption would not extend to the truth of the contents of the document, which has to be separately shown.

Therefore, where the contents of such documents were denied (as was done in the instant case), the truth of the contents of the document would have to be separately established. The presumption under Section 79 was a rebuttable one.

The Court, *inter alia*, examined the contents of the Letter and noted that it dealt with the act of management of the Company showing the extent of control the signatory (one of the Petitioners) wielded over the affairs of the Company on the date of issuance of the Letter. The Court thus held that the resignation from Directorship as contended by the said Petitioner was, *prima facie*, not genuine and that based thereon, the presumption of genuineness of that certified copy stood rebutted. Thus, it would be on the said Petitioner to show the genuineness of the resignation. After careful appreciation of the peculiar facts of the instant case and a reading of various judgments, the Court made the following legal propositions with regard to resignation of a Director of a company:

1. If the accused in a criminal prosecution under Section 138 of the Act produces a certified copy of Form No. 32 certified by the ROC and there is no dispute of the factum of his resignation, the accused is entitled to be discharged from the prosecution.
2. If such resignation is not accepted or admitted by the complainant upon production of the certified copy of Form No. 32, the accused would have to prove the truth of the contents of the said certified copy i.e. the factum of his resignation. Such accused cannot be discharged simplicitor upon production of a certified copy of Form No. 32.
3. If the complainant produces any evidence showing the continuance of the accused as director of a company after

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the date of the resignation claimed by him as per the certified copy of Form No. 32 produced by the accused, such accused cannot be discharged simplicitor upon production of certified copy of Form No. 32. He would have to lead evidence to prove the factum of his resignation. Similarly the complainant would be entitled to prove the accused continuing as director. The trial under section 138 read with 141 of the Act would, therefore, proceed.

The Court thereafter held that the criminal case filed by HUDCO before the trial court shall proceed against all the accused including the Petitioners.

ANALYSIS

The judgment lays down clear and lucid legal propositions and holds that ex directors can also be held liable for dishonor of cheques, if their resignation is not genuine and bonafide or where the complainant leads evidence to show that the directors continue to be in control of the management and affairs of the company.

Directors must therefore ensure that their resignations have been affected in a manner consistent with law, procedure and the charter documents of the company. If the Articles of Association are silent on procedure for resignation, a letter addressed to the Board of the company is sufficient. Where there is a specific provision in the Articles of a company requiring the resignation to be accepted by the Board, then such resignation will only come into effect on the Board's acceptance.

Further, under Section 303(2)³ of the Companies Act, the resignation is required to be sent to the ROC. The procedure so prescribed is by filing of Form No. 32 of General Rules and Forms under the Companies Act.

Thus it is imperative for directors desiring to retire to ensure that each of these steps is followed. This would discharge them from liability arising out of offences committed by the company after their resignation.

- Gautam Dembla, Sahil Kanuga & Vivek Kathpalia

1 Criminal Writ Petition Nos. 1194 of 2008 & 2331 of 2006 respectively.

2 Shows particulars of Appointment of Directors and Manager and Changes among them, as filed with the ROC.

3 Section 303(2) The company shall, within the periods respectively mentioned in this sub-section, send to the Registrar 1[a return in duplicate in the prescribed form] containing the particulars specified in the said register and 2 [a notification in duplicate in the prescribed form] of any change among its directors, managing directors, managing agents, secretaries 3* * * and treasurers, managers or secretaries specifying the date of the change.

The period within which the said return is to be sent shall be a period of [thirty] days from the appointment of the first directors of the company and the period within which the said notification of a change is to be sent shall be [thirty] days from the happening thereof : 5* * * *

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