

To Be, Or Not To Be – Prosecuted. A critical analysis on a director's liabilities and recent legal developments.

written by Rajashree Devchoudhury | November 22, 2019



Gone are the days when the directors of a company could hide under the guise of the corporate veil and escape liabilities. Recent enactments along with the Companies Act, 2013 (“Act”) have enlarged the scope of the liabilities of a director of a company. Unlike the past, the new enactment recognizes the statutory duties required to be adhered to by a director, like exercise of due and reasonable care, skill and diligence, and independent judgement while fulfilling the role of a director. The Act, for the first time, has introduced the concept of “officer who is in default”^[1]. The expression, officer - in - default, has been expanded to include a whole-time director, key managerial personnel, a director specified by the board of the company, an individual who, under the authority of the board, has the responsibility of management of the affairs of the company and its statutory compliance, or an individual under whose guidance, the board functions. Although the liabilities of a director under the Act are clearly defined, ambiguity continues to exist regarding the culpability of a director under various other penal provisions in force in our country. The Hon’ble Supreme Court of India, through its various decisions, has laid a set of guiding principles that hold prominence in ascertaining whether a director of a company is liable to be prosecuted for the offence charged or otherwise. The Hon’ble Supreme Court, in its recent reportable judgement passed on August 23, 2019, in the matter of *Shiv Kumar Jatia v. State of NCT of Delhi*^[2], has once again reiterated the principles and factors that need to be looked into while ascertaining the culpability of a director of a company.

Brief facts of the case

In the case at hand, a company, its managing director, the general manager, and a few other employees were charged to have committed alleged offences punishable under Section 336^[3], 338^[4]

read with Section 32[5] of the Indian Penal Code, 1860 ("IPC") along with Section 4 of the Cigarettes and Other Tobacco Products (Prohibition of Trade and Commerce, Supply and Distribution) Act, 2003 ("COTPA")[6].

The company manages

and runs hotels in the name and style of Hotel Hyatt Regency ("Hotel").

On the date of occurrence of the alleged offence, one of the guests of the Hotel

allegedly fell from the 6th floor of the Hotel to the 4th

floor and sustained serious injury. Further, it was alleged that there was a lapse on the part of the hotel management in taking adequate safety measures for the guests thereby leading to the occurrence of the alleged incident.

The charges levelled

against the managing director of the company in the charge sheet filed by the police is extracted hereinbelow and forms the crux of the reasoning of the Hon'ble Supreme Court:

"2. Shiv Jatia, Managing Director Hyatt Hotel – He is the only non – independent and Executive Director of the Company. He is present in all the board meeting as the chairperson and all decisions of the company / Hotel are taken under his signature. He further authorized Mr. PR. Subramanian to apply for lodging license of the company. Therefore, he is overall responsible for all omission and commission of its officials, violation of lodging license / health trade license with regards to safety of its guests."

Subsequent to the

filing of the charge sheet, the managing director and the other persons accused

of the alleged offence had filed petitions before the Hon'ble High Court of Delhi under Section 482 of the Code of Criminal Procedure seeking quashing of the criminal proceedings initiated against them.

The Hon'ble High Court

of Delhi, in its wisdom, had rejected the petitions and thereafter the managing

director and the other officials of the company had approached the Hon'ble Supreme Court, which while dealing with the matters has specifically dealt with

the issue of the liability of a director of a company for an offence alleged to

have committed by the company under the IPC and has observed thus:

"28. Though there are allegations of negligence on the part of hotel and its officers who are incharge of day to day affairs of the hotel, so far as appellant – accused no.2 Shiv Kumar Jatia is concerned, no allegation is made directly attributing negligence with the criminal intent attracting provisions

under Section 336, 338 read with Section 32 of IPC. Taking contents of the final report as it is we are of the view that, there is no reason and justification to proceed against him only on ground that he was the Managing Director of M/s Asian Hotels (North) Limited, which runs Hotel Hyatt Regency. The mere fact that he was chairing the meetings of the company and taking decisions, by itself cannot directly link the allegation of negligence with criminal intent, so far as appellant – accused no.2. Applying the judgement in

the case of Sunil Bharti Mittal[7]

we are of the view that the said expressed by this Court, supports the case of

the appellant / accused no.2."

From

the above observations made by the Hon'ble Supreme Court and on the basis of precedents of the Hon'ble Supreme Court in cases like Sunil Bharti Mittal, which has been heavily relied upon in this case, the law regarding the liability of a director, in charge of the affairs of a company and the circumstances under which he can be prosecuted can be crystallized as follows:

1. Any

offence committed by a company that involves an element of men's rea can be attributed to the individual in charge of the affairs of the company. For instance, in cases where an offence appears to have been committed by a company

with the express or implied consent/knowledge of the director, he can be held accountable for the same and is liable for prosecution.

• Any

vicarious liability cannot be foisted on a director of a company unless the statute specifically provides for it. For instance, under the Act, in the event

a company fails to comply with the required statutory compliances, a director in – charge is vicariously held liable and can be prosecuted.

• Any

offence committed by a company in which no allegation regarding any "negligence with criminal intent" attributable to the director is made out in the charges levelled against the director, the prosecution against

the director must fail.

Conclusion

For prosecution of a director, under the criminal law when a company commits an offence, differs from situation to situation. Cardinal principles of criminal justice require mens rea as an essential

ingredient for prosecution of the offender. The Hon'ble Supreme Court, in the instant case, has aptly held and expanded on the interpretation of the liabilities of a director in cases where no mens rea, criminal intent or negligence is attributable to the director for the commission of an alleged offence. The Hon'ble Supreme Court has rightly held that allegations against a

director which are vague in nature and which do not attribute any intent for commission of an alleged offence to the director, do not constitute a prosecutable offence against the director, even though the company and its other employees may be held liable for the very same offence.

• [1] Section 2(60) of Companies Act, 2013.

• [2] Criminal Appeal No. 1263 of 2019 (Arising out of SLP (Crl.) No. 8008 of 2018)

• [3] Section - 336 - Act endangering life or personal safety of others.—Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of

either description for a term which may extend to three months, or with fine which may extend to two hundred and fifty rupees, or with both.

- [4] Section – 338 - Causing grievous hurt by act endangering life or personal safety of others.–Whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both.
- [5] Section – 32 - Words referring to acts include illegal omissions. –In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions.
- [6] Section 4 - No person shall smoke in any public place: Provided that in a hotel having thirty rooms or a restaurant having seating capacity of thirty persons or more and in the airports, a separate provision for smoking area or space may be made.

- [7] <https://indiankanoon.org/doc/159121041/>

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