



# PARTNERS IN LIABILITY

## 1. INTRODUCTION [1]

We are more connected in today's world than ever before. With the rise of consumerism and advancement of technology, collaboration has increased a lot and many offerings in the market are a joint effort of many entities. When entities come together to offer a product or service collectively, it gives rise to joint obligations amongst themselves, and consequently liability may also be fastened together on such parties.

“Liability” in simple words is a duty, a breach whereof may bear legal consequences. Legally, when more than one party is involved in discharging certain obligations, the liability may be either joint or several.

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Joint and several liability is also a concept arising out of a contract where a specific provision may be made in a contract to make parties, jointly and severally liable, which means that in such cases both the parties are to be held liable for the acts and/ or omissions of the either party jointly as well as individually.

### Illustration

'A' booked a ticket on an online ticketing platform. The online ticketing platform had an arrangement with a ticketing aggregator and the aggregator was booking flight tickets with the Airlines.

[1] The article reflects the general work of the authors and the views expressed are personal. No reader should act on any statement contained herein without seeking detailed professional advice.

'A' got confirmation of ticket. However, when he reached the airport, the ticket was shown as invalid. A, as a consumer shall be entitled to sue the ticketing platform along with the airlines and allege joint and several liability. However, if the parties have incorporated suitable disclaimers, roles, and responsibilities then A's rights may be considered in different light.

The concept of joint and several liability is covered under Indian Contract Act, 1872 (hereinafter referred to as Act) and also certain other statutes.

## 2. JOINT AND SEVERAL LIABILITY UNDER CONTRACT ACT

### Section 43: Joint liability

The (Act) specifies the joint and several liability in Section 43 and gives lot of importance to the intention of the parties. Typically, joint promise implies joint liability unless parties have agreed otherwise:

#### a) In case of a joint promise:

- generally, promisee<sup>[2]</sup> may seek both to perform the contract, in the absence of express agreement to the contrary

- each of the promisor<sup>[3]</sup> may compel the other promisor to contribute in performance, unless a contrary intention appears from the contract;

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[2] Promisee is a person in whose favour promise is made or the beneficiary under the agreement

- if there is a default by any promisor, then others must bear the loss in equal shares;

This section states that the parties working together under a contract are said/ assumed to be liable for any loss or damage that takes place unless a contrary provision is enumerated under the said contract. Defining the liability of the parties under a contract or stating the contrary through disclaimers needs to be properly determined and as may be stated in the contract to ensure the applicability of joint and several liability, especially in case of discharge of joint obligations like when they are agreeing to discharge joint obligations like bidding under a consortium in a tender.

The aspect was more specifically explained in the case decided by Delhi High Court, Ernst & Young Pvt.ltd Vs. Ministry of Youth affairs & sports, Government of India & Ors<sup>[4]</sup>.

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[3] Promisor is the person who agrees to perform the agreement.

[4] OMP (COMM) 71/2018 Ernst and Young Private Limited vs. Ministry of Youth Affairs and Sports, Government of India and Ors. (20.03.2018 - DELHC)





Under this case, a joint EOI (Expression of Interest) was filed by the petitioner and M/s Event Knowledge Services, Switzerland in response to a tender issued by the Ministry and the petitioners formed a consortium, with the petitioner as prime/lead tenderer. Pursuant to the selection of the consortium, an agreement dated 24th March 2008 was executed between OC CWG and the consortium comprising of the petitioner and EKS Switzerland collectively called the 'Consultant'.

On 1st June 2009, EKS, Switzerland by a Deed of Assignment transferred all its rights, duties, and obligations in the aforesaid agreement to EKS, Mauritius, which was incorporated under the laws of Republic of Mauritius with its registered office at Port Louis (hereinafter referred to as 'EKS'). The Respondent No.1, inter alia claiming that it had paid/deposited advance tax on behalf of EKS, filed its claim before the Arbitral Tribunal seeking reimbursement of the same. Consultant disputed this liability on various grounds like EKS was not liable to pay tax in India etc. but the Arbitral Tribunal held that the petitioner and EKS are liable to pay such amount.

The Arbitral Tribunal, relying upon Clause 7 of the agreement has held that there was a joint and several liability of the petitioner and EKS to discharge the tax liability. Clause 7 of the General Conditions of the Contract (GCC) between the parties:

**"7. Authority of Lead Partner** In case the Consultant consists of a joint venture/ consortium association of more than one entity, the Members hereby authorize the entity specifies (Lead Consultant) in the SC to act on their behalf in exercising all the Consultant's rights and obligations towards the Employer under this Contract, including without limitation the receiving of instructions and payments from the Employer. However, each member or constituent of Consortium of consultant shall be jointly and severally liable for all obligations of the Consultant under Contract."

Clause 9 of the agreement dealt with taxes and duties. It provided that the consultant shall be liable to pay such direct and indirect taxes, duties, fees, and other impositions levied under the laws of India.

The Court observed that where a party under the contract agrees or undertakes to discharge the tax liability of another party, he is bound to do so as there is nothing illegal, about it. "A conjoint reading of Clauses 7 and 9 explained, that the parties had agreed that they shall be jointly and severally liable to discharge the tax liability of a defaulting member. The mere fact that under Clause 42 of the GCC, each member is required to submit separate invoices for payment of their respective dues to it and under Clause 41 thereof separate payments are made to them, do not dilute the joint tax liability, or nullify Clauses 7 and 9 of the GCC."

### Reimbursement covered under Section 69:

The section covers the joint and several liability from a different perspective i.e., if a person pays certain sums of money for which another person is also liable under an obligation to pay, he is entitled to a reimbursement of the sums so paid. It is pertinent to note here that, contribution and reimbursement are two different aspects where first deals with the obligation under a contract to contribute, while the other deals with responsibility to reimburse a person paying money due by another.

Illustration: If 'A' is held liable as a guarantor in respect of credit facility availed by any Company/Borrower in respect of some debt or borrowings availed from bank which the Borrower/Company has failed to pay. 'A' will be needed to make the payment of the debt amount to Bank. After making such payment to the bank, 'A' as a Guarantor can seek to reimburse back the payment from the Company/ Borrower on behalf of whom 'A' had paid the liability, as mentioned in Section 69 of the Indian Contract Act, 1872, which is reproduced as, "a person who is interested in the payment of money, which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other."



### 3. JOINT AND SEVERAL LIABILITY UNDER CODE OF CIVIL PROCEDURE, 1908

The concept of joint and several liability is also recognized in Code of Civil Procedure, Order I, Rule 6 as the joinder of parties liable on the same contract is applicable when several parties join as plaintiffs in the same suit.

### 4. CERTAIN EXCEPTIONS- JOINT AND SEVERAL LIABILITY UNDER NEGOTIABLE INSTRUMENTS ACT (“NI ACT”)

#### Joint and Several Liability of an Individual:

Joint Liability under Negotiable Instruments Act arises only when a cheque is issued by an individual who has a joint bank account where more than one person is a signatory under such bank account.

This was more specifically explained in a Supreme Court judgement of Alka Khandu Avhad v/s Amar Shyamaprasad Mishra & Anr [5] which decided on the ambit of joint liability under Negotiable Instrument Act when a cheque is dishonoured. In this case, a husband and a wife had approached an advocate with respect to a litigation matter and the advocate accordingly provided his services to the couple. The advocate later raised an invoice amounting to Rs. 8,62,000/- for services rendered to the couple for which the husband had issued a post-dated cheque. However, the cheque was dishonoured with a remark “Funds Insufficient”.

The advocate then filed a complaint before the Metropolitan Court at

Borivali after the couple’s failure to respond to the legal notice earlier issued/ served by the advocate contending that the wife and husband together form an association of persons, and thus are jointly liable like a managing director is liable for company or a partner for a cheque issued by the firm. However, the wife challenged the same by way of filing criminal writ petition before the Bombay High Court and prayed to quash the criminal complaint filed against her. The wife contended that:

- she was neither a joint account holder of the account from where the cheque was issued,
- nor she was the signatory for the said account.

Thus, she should not be held liable for such dishonour of cheque. The High Court refused to quash the criminal complaint so filed.

The litigation moved to Supreme Court and after hearing both the parties, the Supreme Court upheld the wife’s contention and held that, “Section 141 of the NI Act is relating to the offence by companies, and it cannot be made applicable to the individuals. ... .... Two private individuals

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[5] Criminal Appeal No. 258 Of 2021



cannot be said to be “other association of individuals”. Therefore, there is no question of invoking Section 141 of the NI Act against the appellant, as the liability is the individual liability (may be a joint liability) but cannot be said to be the offence committed by a company or by corporate or firm or other associations of individuals. The appellant herein is neither a Director nor a partner in any firm who has issued the cheque. Therefore, the appellant cannot be convicted with the aid of Section 141 of the NI Act.”

Section 141 of the NI Act states that a partner in partnership firm and/ or a director/ managing director/ official of a company may become liable for an offence committed while he was responsible for conduct of the business of such company when the offence was committed. Provided that, if he proves that such offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence, the person cannot be held guilty/ liable.

## 5. APPLICABILITY TO OTHER ACT:

Certain other statutes have categorically mentioned joint and several liability. For example, Rule 5 of Prevention of Cruelty to Animals (Care and Maintenance of Case Property Animals) Rules, 2017, provides that in case of offence relating to transport of animals, the vehicle owner, consignor, consignee, transporter, agents, and any other parties involved shall be jointly and severally liable for the cost of transport, treatment, and care of animals.

This was specifically held in a recent judgement of High Court of Bombay in *Altaf Babru Shaikh v/s. State of Maharashtra and Anr*[6] where it was observed that,

“The learned Sessions Judge has rightly observed that the

petitioner being owner of the truck is jointly and severally liable for the cost of transport, treatment and care of animals.” More information on Prevention of Cruelty to Animals Act is covered under our previous article written on animal cruelty.

## 6. CONCLUSION:

Whenever any party is dealing with other party e.g. Promoters Vs. Investors, Service providers Vs. Employer, they must ensure that joint and several liability is not accepted, and if they are forced to accept such joint and several liability, necessary back-to-back arrangement in terms of Insurance or inter-se arrangement is defined to provide for consequences of such liability claims.



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[6] Criminal Writ Petition No. 2466 Of 2022

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