Samsung India Electronics Pvt. Ltd. 7th and 8th Floor, IFCI Tower, Nehru Place, New Delhi-110019 and Mr. Mahesh Chandra, Samsung India Electronics Pvt. Ltd. 7th and 8th Floor, IFCI Tower, Nehru Place, New Delhi-110019 Vs State of Assam, M/S Shiva Bottles Pvt. Ltd. and Mr. Avinash Jalan

Court: Gauhati High Court

Date of Decision: July 26, 2012

Acts Referred: Constitution of India, 1950 â€" Article 226
Criminal Procedure Code, 1973 (CrPC) â€" Section 155(2), 156(1), 397, 482
Income Tax Act, 1961 â€" Section 276B, 278B
Penal Code, 1860 (IPC) â€" Section 11, 120B, 2, 279, 337
Terrorist and Disruptive Activities (Prevention) Act, 1987 â€" Section 3(4)

Citation: (2012) 4 GLT 546

Hon'ble Judges: Iqbal Ahmed Ansari, J

Bench: Single Bench

Advocate: A.K. Saraf, Mr. D. Baruah, for the Appellant; Z. Kamar, Public Prosecutor, Assam for the respondent 1, Mr. T.N. Das, Mrs. S. Deka, S.K. Bhattacharyya and Mr. G. Goswami, Advocates for the respondent 2 and 3, for the Respondent

Judgement

I.A. Ansari

1. Apart from seeking, with the help of the present application, made u/s 482 CrPC., quashing of the complaint, which gave rise to Complaint

Case No.9695C/2006, on the ground that the complaint, in question, is not sustainable in law inasmuch as the complaint does not disclose

commission of any offence, the petitioners have also sought for quashing of the order, dated 02.01.2007, passed by the learned Additional Chief

Judicial Magistrate, Kamrup, whereby, having taken cognizance of offences under Sections 420 and 406 IPC, the learned Additional Chief

Judicial Magistrate, Kamrup, has directed issuance of summons against, amongst others, the present petitioners as accused. The case of the

complainant may, in brief, be set out as under:

(i) The complainant is the Managing Director of M/S Shiva Bottles Private Limited; whereas the accused No. 1, namely, M/S Samsung India

Electronic Private Limited Company is a company, with accused No. 2, as its Public Relation Officer and the accused No. 3, as the proprietor of

Triveni Infotech, is a retailer of the products of M/S Samsung India Electronic Private Limited Company.

(ii) The complainant purchased a Samsung Laser Printer from M/S Triveni Infotech, at AT Road, on 20-01-2006, on being convinced by accused

No. 3, that the complainant would avail a toner, free of cost, against such Laser Printer. Upon purchase of the said Laser Printer, the complainant

was asked by accused No. 3 to submit, through internet, a form for the Scheme, whereunder the free toner was to be provided, the filling up of the

form being mandatory, in nature, to enable a buyer obtain free toner, whereupon accused No. 2, who is the Public Relation Officer of the accused

No. 1, sent a letter to the complainant informing him about the complainant''s registration under the said Scheme for providing free toner and asked

the complainant to submit some documents with a demand draft of Rs. 250/- in favour of M/s. Samsung India Limited, as handling charge, of the

free toner. Acting upon the instructions, so received from accused No. 2, the complainant sent the requisite demand draft, which the accused No.

2 had received.

(iii) Thereafter, though the complainant had several telephonic talks with accused No. 2 and accused No. 2 had been informing the complainant

that he would send the free toner, whenever stocks become available, the free toner was not sent and the complainant had to issue a notice to the

accused, on 19-09-2006, demanding them to fulfill their promise as regards free toner. After receiving the notice, accused No.3, as the retailer of

the product, in question, sent a letter to the complainant stating therein to the effect that he had no role to play in providing free toner as the

Scheme was, directly, offered by M/S Samsung India Electronic Private Limited Company to the customers. However, accused No. 3 did write,

in his said letter, that he would, of course, request the accused company to deliver the complainant''s promised free toner.

(iv) The complainant, thus, smelled dishonest intention of the accused from its very beginning and, hence, came to the conclusion that the accused

had intentionally defrauded the complainant and committed thereby offences u/s 420 IPC as well as Section 406 IPC.

2. Having examined the complainant, the learned Court below, as indicated above, directed issuance of processes against the petitioners as

accused. Aggrieved by the direction to issue processes, as indicated hereinbefore, the petitioners are, now, before this Court challenging the

legality of the complaint, in question, and also the legality and validity of the impugned order, dated 02-01-2007, aforementioned.

3. Coupled with the above, what cannot and must not be ignored is that the impugned order, dated 02-01-2007, ex facie suffers from non-

application of mind inasmuch as the learned Court below has issued processes against the accused-petitioners under the penal provisions of

Section 420 IPC as well as Section 406 IPC without appreciating the position of law that the ingredients of these two offences are materially

different from, and wholly irreconcilable with, each other.

4. Before entering into the discussion as to whether the impugned order taking cognizance of offences aforementioned and directing issuance of

processes against the accused-petitioners is sustainable in law or not, one needs to point out the principal distinction between "criminal breach of

trust" and "cheating".

DISTINCTION BETWEEN CRIMINAL BREACH OF TRUST AND CHEATING

5. In "criminal breach of trust", the accused comes into possession of the property or acquires dominion over the property honestly and bona fide,

but he develops dishonest intention subsequent to the taking possession of, or subsequent to having acquired the dominion over, the property and,

having developed such dishonest intention, he dishonestly misappropriates or converts to his own use the property or dishonestly uses or disposes

of the property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or

implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do.

6. Thus, in "criminal breach of trust", the intention of the accused cannot be dishonest or mala fide at the time, when he comes into possession of

the property or comes to acquire dominion over the property; but, having come into possession of, or having acquired dominion over, the

property, the accused develops dishonest intention and actuated by such mens rea, he converts to his own use the property or dishonestly uses or

disposes of the property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract,

express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do.

7. Contrary to what happens in "criminal breach of trust", the intention of the accused, in a case of "cheating", is dishonest from the very

commencement of the transaction. There is really no consent by the person, who is intentionally induced by deception to deliver the property or

allow any person to retain the property or is intentionally induced, as a result of deception, to do or omit to do anything, which he would not do or

omit to do if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind,

reputation or property.

8. In short, thus, while in "criminal breach of trust", the accused comes into possession of the property without dishonest intention and develops

dishonest intention subsequent to his coming into possession of the property, the offence of cheating is one, wherein the accused has dishonest

intention from the very commencement of the transaction.

9. What logically follows from the above discussion is that if a person is accused to have committed an offence, u/s 406 IPC, in relation to a

transaction, he cannot, in one and the same breath, be said to have committed the offence, u/s 420 IPC, in relation to the same transaction.

WHEN CAN A COMPLAINT OR FIRST INFORMATION REPORT BE QUASHED?

10. While considering the present application, made u/s 482 CrPC., it needs to be noted that the law, with regard to quashing of criminal

complaint, is no longer res integra. A catena of judicial decisions has settled the position of law on this aspect of the matter. I may refer to the case

of R.P. Kapur Vs. The State of Punjab, , wherein the question, which arose for consideration, was whether a first information report can be

quashed u/s 561A of the Code of Criminal Procedure, 1898. The Court held, on the facts before it, that no case for quashing of the proceeding

was made out. Gajendragadkar, J, speaking for the Court, observed that though, ordinarily, criminal proceedings, instituted against an accused,

must be tried under the provisions of the Code, there are some categories of cases, where the inherent jurisdiction of the Court can and should be

exercised for quashing the proceedings. One such category, according to the Court, consists of cases, where the allegations in the FIR or the

complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases, no question

of appreciating evidence arises and it is a matter merely of looking at the FIR or the complaint in order to decide whether the offence alleged is

disclosed or not. In such cases, said the Court, it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the

process of the criminal Court to be issued against the accused. From the case of R.P. Kapoor (Supra), it becomes abundantly clear that when a

look into the contents of a complaint shows that the contents of the complaint, even if taken at their face value and accepted to be true in their

entirety, do not disclose commission of offence, the complaint shall be quashed.

11. As a corollary to what has been discussed above, it is also clear that if the contents of the complaint disclose commission of offence, such a

complaint cannot be, ordinarily, quashed.

12. Laying down the scope of interference by the High Court in matters of quashing of FIR or complaint, the Supreme Court, in State of Haryana

and others Vs. Ch. Bhajan Lal and others, , laid down as follows :-

102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law

enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 of the inherent powers u/s

482 of the Code, which we have extracted and reproduced above, we give the following categories of cases by way of illustration, wherein such

power could be exercised either to prevent abuse of the process of the any Court or otherwise to secure the ends of justice, though it may not be

possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines of rigid formulae and to give an exhaustive list

of myriad kinds of cases, wherein such power should be exercised :-

(1) Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their

entirely, do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations made in the First Information Report and other materials, if any, accompanying the FIR do not disclose a cognizable

offence justifying an investigation by police officers u/s 156(1) of the Code except under an order of a Magistrate within the purview of section

155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and evidence collected in support of the same do not disclose the

commission of any offence and make out a case against the accused.

(4) Where the allegation in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted

by a police officer without an order of a Magistrate as contemplated u/s 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever

reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned act (under which criminal proceeding is

instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act

providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive

for wreaking vengeance of the accused and with a view to spite him due to private and personal private grudge.

13. In the case of Bhajanlal (supra), the Supreme Court gave a note of caution on the powers of quashing of criminal proceedings in the following

words :-

103. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with

circumspection and that too in the rarest of rare cases; that the Court will not be justified in embarking upon an enquiry as to the reliability or

genuineness or otherwise of the allegations made in the FIR or the complaint and that the extra ordinary or inherent powers do not confer an

arbitrary jurisdiction on the Court to act according to its whim or caprice.

(Emphasis is added)

14. It is clear from a close reading of the principles laid down, in the case of R.P. Kapoor (supra) and Bhajanlal (supra), that broadly speaking,

quashing of a First Information Report or a complaint is possible (a) when the allegations made, in the First Information Report or the complaint,

even if taken at their face value and accepted in their entirely as true, do not prima facie constitute any offence or make out a case against the

accused; (b) when the uncontroverted allegations, made in the FIR or complaint and evidence collected in support of the same, do not disclose the

commission of any offence and/or make out a case against the accused; and (c) when the allegations made in the FIR or complaint are so absurd

and inherently improbable that on the basis of such absurd and inherently improbable allegations, no prudent person can ever reach a just

conclusion that there is sufficient ground for proceeding against the accused.

15. In other words, when the allegations, made in an FIR, disclose commission of a cognizable offence, such an FIR cannot, ordinarily, be quashed

by relying upon some other materials on which will depend the defence of the accused, for, in such cases, truthfulness or otherwise of the

allegations contained in the FIR or the probability of the defence plea can be determined only by effective investigation or at the trial.

16. However, in Harshendra Kumar D. Vs. Rebatilata Koley Etc., , the Supreme Court has made it clear that it is not an absolute rule of law that

the High Court, while exercising its jurisdiction u/s 482 CrPC, or, while exercising its revisional jurisdiction u/s 397 CrPC, cannot, under any

circumstances, look into the nature of public document or such materials, which are beyond suspicion or doubt, in order to ascertain if the criminal

prosecution should or should not be allowed to proceed. In fact, the Supreme Court has also made it clear, in Harshendra Kumar D. (supra), that

no greater damage can be done to the reputation of a person than dragging him in a criminal case. The Supreme Court has, therefore, held, in

Harshendra Kumar D. (supra), that the High Court fell into grave error in not taking into consideration the uncontroverted documents relating to

the appellant''s resignation from the post of director of the company, which, if looked into, would have made it clear that the appellant''s resignation

from the post of director of the company was much before the cheques had been issued by the company. The relevant observations, which

appear, in this regard, at paragraph 25 and 26, in Harshendra Kumar D. (supra), read as under:

25. In our judgment, the above observations cannot be read to mean that in a criminal case where trial is yet to take place and the matter is at the

stage of issuance of summons or taking cognizance, materials relied upon by the accused, which are in the nature of public documents or the

materials which are beyond suspension or doubt, in no circumstance, can be looked into by the High Court in exercise of its jurisdiction u/s 482 or

for that matter in exercise of revisional jurisdiction u/s 397 of the Code. It is fairly settled now that while exercising inherent jurisdiction u/s 482 or

revisional jurisdiction u/s 397 of the Code in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the

defence of the accused or embark upon an inquiry in respect of merits of the accusations. However, in an appropriate case, if on the face of the

documents - which are beyond suspension or doubt - placed by the accused, the accusations against him cannot stand, it would be travesty of

justice if the accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to

prevent injustice or abuse of process, the High Court may look into the materials which have significant bearing on the matter at prima facie stage.

26. Criminal prosecution is a serious matter; it affects the liberty of a person. No greater damage can be done to the reputation of a person than

dragging him in a criminal case. In our opinion, the High Court fell into grave error in not taking into consideration the uncontroverted documents

relating to the appellant''s resignation from the post of Director of the Company. Had these documents been considered by the High Court, it

would have been apparent that the appellant has resigned much before the cheques were issued by the Company.

17. From the law laid down in Harshendra Kumar D. (supra), it becomes clear that when the High Court is approached for quashing of a criminal

prosecution in exercise of its extra-ordinary jurisdiction u/s 482 CrPC, or in exercise of its revisional jurisdiction u/s 397 CrPC, the High Court has

to bear in mind that criminal prosecution affects the liberty of a person and there can be no greater damage done to the reputation of a person than

dragging him in a criminal case. There is, therefore, no absolute bar, on the High Court''s power, to take into consideration any uncontroverted

document, which may have come on record, for the purpose of arriving at a decision as to whether a criminal prosecution should or should not be

allowed to continue and, if the Court, on the basis of any public or uncontroverted document, comes to the conclusion that allowing the criminal

prosecution to proceed, in such a case, would amount to abuse of the process of the Court, the High Court has the duty to quash such a

proceeding.

18. It is, no doubt, true that while exercising its inherent jurisdiction u/s 482 CrPC, or its revisional jurisdiction, u/s 397 CrPC, where a complaint

or FIR is sought to be quashed, it is not proper, on the part of the High Court, to consider the defence of the accused or enquire into the

correctness or veracity of the accusations made against the accused. Nonetheless, in appropriate cases, if, in the face of the documents placed by

the accused, which are beyond suspicion or doubt, the accusations against the accused cannot stand, it would be perversity of justice if the

accused is asked to face trial, for, if it is so done, it would amount to denial of justice and would be tantamount to preventing justice from being

done. This would be nothing short of abuse of the process of the Court.

19. Coupled with the above, there is no doubt that an FIR or a complaint may be quashed if the same is found to be actuated by mala fide (See.

Hira Lal and Others Vs. State of U.P. and Others,) or make accusations, which are absurd or inherently improbable that no reasonable man

would accept the allegations made in the FIR or the complaint, as the case may be, as true and/or in a case where the FIR and/or the complaint, as

the case may be, is lodged as a counterblast. (See. M.N. Ojha and Others Vs. Alok Kumar Srivastav and Another,). The FIR or a complaint

may even be quashed when the same is used as a weapon of harassment or persecution (See. State of Karnataka Vs. L. Muniswamy and Others,

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20. Admittedly, respondent no. 1 is a company incorporated under the Indian Companies Act. Therefore, one of the vital questions, which the

present application, made u/s 482 CrPC., has raised, is: whether prosecution of a company or a corporate body is possible, in India, for

commission of an offence if mens rea forms an indispensable ingredient of the offence?

21. In the light of the law laid down in iridium Iridium India Telecom Ltd. Vs. Motorola Incorporated and Others, , there cannot be any dispute

that prosecution of a corporate body is possible for an offence, which involves mens rea. The question, however, remains, as correctly points out

Dr. Saraf, as to what theory would be applied for such prosecution, whether the theory of identification or attribution, as the same is called, shall

be applied in India or the theory of vicarious liability or respondent superior, which we shall apply.

THEORIES ON CORPORATE CRIMINAL LIABILITY AND LIMITATIONS THEREOF

22. World over, the corporations have been indicted and sought to be prosecuted on the basis of either the theory of ''vicarious liability'' or the

''identification theory''. Some other theories, like ''aggregation theory'' and ''corporate culture method'', have also been explored; but when read in

its entirety, it is a hybrid form of the two basic theories i.e. ''vicarious liability'' and ''identification''.

23. There has been a continuous debate as to the accountability and predictability of the existing theories. Advantages and disadvantages have

been written in volumes; but the debate still continues to find out a foolproof theory. Can we have an independent theory, to meet the menace of

the corporate crimes, is the question that still eludes us.

24. Generally speaking, there are two ways a corporation can commit crime:-

I. Firstly, where the crime does not require intent, e.g. pollution, food adulteration and several other acts or omissions, which give rise to tortious

liability.

II. Secondly, where the crimes require intent, e.g, offences against property, in all its forms.

25. For the cases falling in the category (i), since mere act or omission is sufficient to fasten liability, it is relatively easier to apply the concept of

vicarious liability in the offences coming under this category. It may be worth mentioning here that most of the offences, which do not require

existence of mens rea, are also torts in some form or the other, e.g, creating pollution is basically a tort of nuisance and fatal accident is a tort of

negligence. These acts or omission, therefore, not only give rise to remedies in civil law, but in criminal law as well. The theory of vicarious liability,

therefore, appears better suited for prosecuting corporations for commission of offences, which do not require mens rea.

26. Under the ''vicarious liability'' model, corporations may become criminally liable for the illegal acts of officers, employees or agents, provided it

can be established that:

Ã¯Â¿Â½ the individual''s actions were within the scope of his employment; and

Ã¯Â¿Â½ the individual''s actions were intended, at least, in part, to benefit the corporation

HISTORY OF DEVELOPMENT OF CORPORATE CRIMINAL LIABILITY BY APPLYING VICARIOUS LIABILITY

27. In 1846, Lord Denman ruled, in The Queen v. Great North of England Railway Co 1294 (Q.B. 1846), that corporations could be criminally

liable for misfeasance. This development, eventually, encouraged courts to extend corporate criminal liability to all crimes not requiring intent. Once

the principle, that corporations could be convicted of misfeasance for creating a nuisance, was established, there was no theoretical impediment for

imposing liability for other acts of misfeasance. In order to hold corporations liable for misfeasance, courts imputed agent-conduct to corporations.

Such an imputation would have been theoretically not possible without the doctrine of vicarious liability. The growth of the doctrine of respondent

superior, which is nothing but the theory of vicarious liability, coincided with the growth in the number and importance of corporations and with

society''s subsequent demand for regulation of their business activities.

28. Later, in the case of Ranger Vs. Great Western Ry. Co., reported in (1854) 5 HLC 72, Lord Cranworth observed as under:

Strictly speaking, a corporation cannot itself be guilty of fraud. But where a corporation is formed for the purpose of carrying on a trading or other

speculation for profit, such as, forming a railway, these objects can only be accomplished by the agency of individuals; and there can be no doubt

that if the agents employed conduct themselves fraudulently, so that if they had been acting for private employers, the persons, for whom they were

acting, would have been affected by their fraud, the same principles must prevail, where the principal, under whom the agent acts, is a corporation.

(Emphasis is added)

29. From the above observations made by Lord Cranworth, in Great Western Rly. Co. (supra), it becomes clear that as early as in 1854, the

Court took the view that where a corporation is formed for the purpose of carrying on a trade or any speculative business, objects of such a

corporation can only be achieved by the agency of individuals; and, hence, if the agents of a company act fraudulently, the principle of agency shall

be attributable to the company in the same manner as is applicable to a private employer as far as acts of his agents are concerned. Thus, the seeds

of application of the doctrine of vicarious liability or respondent superior, as we may like to call, were sown in Ranger''s case (supra).

30. The rule, in Great Western Ry. Co. (supra), was accepted in Mackay Vs. Commercial Bank of New Brunswick, reported in (1874) LR 5 PC

394.

41. The decision, rendered in New York Central & Hudson River Railroad Co. v. United States 212 U.S. 481 (1909), was another development

in the doctrine of ''vicarious liability''(sometimes called agency theory), wherein the offence alleged was a crime, which required intent, and the

criminal intent, in New York Central & Hudson River Railroad Co. (supra), was attributed to the company on the principle of ''vicarious liability''.

The case reached the US Supreme Court, on appeal, from New York Central''s conviction for an Elkins Act violation. On appeal, counsel

contended that Section 1 of the Act, which specifically declared the acts of officers, agents and employees of a common carrier to be the acts of

the carrier, was unconstitutional and to fine the corporation for the acts of its employees amounted to taking money from and punishing innocent

stockholders without due process of law. The Court disagreed and held that Congress could impose liability on corporations. The US Supreme

Court clearly held, in New York Central & Hudson River Railroad Co. (supra), that the corporation was liable for crimes of intent. The

observations of the Court read as under:

We see no valid objection in law, and every reason in public policy, why the corporation, which profits by the transaction, and can only act through

its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has entrusted authority to act in

the subject matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for

which the agents act. While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it

cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly

that interstate commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine

that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject matter and correcting the

abuses aimed at.

(Emphasis is added)

31. However, it needs to be borne in mind that the above observations, in New York Central & Hudson River Railroad Co. (supra), were made

keeping in view the provisions of Elkins Act, which contained sweeping provisions and included the acts of Directors, Officers and Agents as the

acts of the Corporation. Thus, the conviction of the company, in New York Central & Hudson River Railroad Co. (supra), was not based on any

theory; rather, on statutory provisions.

32. If, therefore, a statute contains a provision similar to the one contained in the Elkins Act, a conviction of a corporation on the acts or omission

of an agent may, perhaps, not be avoided; but what if the crime is committed under the Indian Penal Code, which is applicable to natural persons,

for instance, cheating, fraud, etc. If we apply the test, laid down in the case of New York Central & Hudson River Railroad Co (supra), the result

would be that if an agent commits the offence of cheating, without there being any suggestion or direction to commit such acts, it will render the

corporation liable for penal provisions. One of the fallouts of adoption of such an approach would be that even when there is any direction or any

prohibition from the respondent superior to his agent not to do any act of dishonesty, the corporation would still be criminally liable for the act,

done by the agent, if his act was within the scope of his employment, but done with dishonest intention, though to benefit the Corporation. We may

pause here to point out that the Indian Penal Code, as indicated in S.K. Alagh Vs. State of U.P. and Others, , and S.K. Alagh Vs. State of U.P.

and Others, , which we will discuss later, does not make a corporate body vicariously liable unlike special statutes, such as, Negotiable Instrument

Act, 1881.

33. The doctrine of "vicarious liability" still holds the field in the United States and in one of the recent cases, the principle has been invoked to the

extent of punishing a company for entering into conspiracy. In US Vs Potter, reported in 463F 3d9 (1st Cir, 2006), the US Supreme Court

observed as follows;

For obvious practical reasons, the scope of employment test does not require specific directives from the board or president for every corporate

action; it is enough that the type of conduct (making contracts, driving the delivery truck) is authorized ... The principal is held liable for acts done

on his account by a general agent which are incidental to or customarily a part of a transaction which the agent has been authorized to perform.

And this is the case, even though it is established fact that the act was forbidden by the principal. ... despite the instructions [the individual in

question] remained the high-ranking official centrally responsible for lobbying efforts and his misdeeds in that effort made the corporation liable

even if he overstepped those instructions.

34. Thus, the American courts have been following the interpretation put forward in New York Central & Hudson River Railroad Co. v. United

States 212 U.S. 481 (1909).

CRITICISM OF VICARIOUS LIABILITY

35. The application of the doctrine of "respondent superior" to the field of criminal liability has been under severe criticism. In order to appreciate

this criticism, it is necessary to note that three conditions are, generally, required to be satisfied to attract the application of the theory of vicarious

liability:

1. Was the act committed within the time and space limits of the agency?

2. Was the offence incidental to, or of the same general nature as the responsibilities of the agent, which the agent was authorized to perform?

3. Was the agent motivated to any degree to benefit the principal by committing the act?

36. The theory of vicarious liability is based on the doctrine of agency. There is, thus, a delegation, by the principal, of his discretion. If the acts are

within the limits of instructions, the principal may be held liable in criminal law; but what if the acts of the agent are beyond the scope of powers

delegated.

Illustration:

37. A vehicle of a transport company meets with an accident, because of rash driving and injures a pedestrian. The act of rash driving is a tort of

negligence; and if we speak in Indian context, it is an offence as well u/s 279/ 337 IPC. The remedy, available to the pedestrian, is to sue for

damages under civil law and also to prosecute under the criminal law. It is, however, extremely important to bear in mind that so far as payment of

damages is concerned, the corporation can be held liable on the principles of vicarious liability, because the vehicle belongs to the corporation and

it can be made to indemnify the loss occurring to public for the negligent acts of its driver. The basic facts, required to be proved, in such a case, in

order to fasten transport company with civil liability are that the driver was employed by the corporation and the accident occurred in the course of

his employment.

38. Now, under the concept of ''vicarious liability'', the corporation also becomes liable for penal provisions, because the driver was acting for the

benefit of the corporation and his acts or omissions are attributable to the corporation.

39. It is difficult to perceive how the corporation can be made criminally liable in such a case. This concept of vicarious liability appears good for

civil remedies, because the driver may not be able to compensate the victim, while the corporation can. But the question is whether the same

standard can be applied for criminal prosecution.

40. It is one of the basic principles of criminal jurisprudence that a person can be punished only for his such act or omission, which is punishable. A

company has an independent existence as a person. If, therefore, it were to be punished, there ought to be evidence that it has committed the

crime. To bring home the charge against the corporation, it must be proved that the rash or negligent driving was done under the instructions of the

corporation. The standard of proof required will be beyond reasonable doubt. If, indeed, the complaint alleges a role for the corporation in the

commission of the offence, the corporation can be arraigned; but it, perhaps, cannot be conceived that a transport company will instruct its driver

to drive negligently. However, going by the doctrine of vicarious liability as applied to corporate crimes, in the United States, the corporation will

nevertheless be liable under the penal law, because, at the time of driving, the driver was employed by the company and his actions, while driving

the vehicle, were for the benefit of the company irrespective of the fact, whether the company had the knowledge that the driver would drive rashly

or not. The doctrine of vicarious liability, if we may reiterate, is, in the light of SK Alagh (supra), foreign to the scheme of the Indian Penal Code,

particularly, when the offence requires mens rea.

41. The theory of "vicarious liability" raises three important questions:

i. Whether on the principles of vicarious liability, the liability of a company, in civil law, for the wrongful acts of its agent, will also render the

company liable for punishment under criminal law?

ii. Is it for the public benefit that many of the jurisprudential concepts have been dispensed with, while holding the corporation liable for offences,

which do not require mens rea?

iii. Is the application of vicarious liability a myth, because, in reality, the principle appears to be that of strict/absolute liability?

DEVELOPMENT OF STRICT LIABILITY

42. While the American courts were content with application of agency theory to corporate crimes, both with intent or without intent, the English

Courts, though they too had, initially, applied the theory of vicarious liability in the field of criminal liability, particularly, in relation to crimes

involving criminal intent, began to explore new possibilities than the one conceived of in the cases of The Queen v. Great North of England Railway

Co, Ranger Vs. Great Western Rly. Co, & Mackay vs Commercial Bank, Brunswhik (already referred to above).

43. In the case of Pearks, Gunston and Tee, Ltd. Vs. Ward, reported in 1902 (2) KB 1, while referring to the provision of the Food and Drugs

Act, 1875, Channell, J. stated as follows:

.....by the general principles of criminal law, if a matter is made a criminal offence, it is essential that there should be something in the nature of

mens rea, and, therefore, in ordinary cases, a corporation cannot be guilty of a criminal offence nor can be liable criminally for an offence

committed by his servant.

44. Thus, the case of Pearks, Gunston and Tee, Ltd (supra), for the first time, noticed that a different approach may be required to convict a

corporation for crimes requiring mens rea, when such crime is committed by its servant, although the case did develop the concept of strict liability,

when the Judge observed that:

.....but there are exception to this rule in the case of quasi-criminal offences, as these may be termed, that is to say, where certain acts are

forbidden by law under a penalty, possibly even under a personal penalty, such as imprisonment, at any rate in default of payment of a fine; and the

reason for this is, that the legislature has thought it so important to prevent the particular act from being committed that it absolutely forbids it to be

done; and if it is done, the offender is liable to a penalty whether he had any mens rea or whether or not he intended to commit a breach of the law.

45. What is, now, of immense importance to note is that in Pearks, Gunston and Tee Ltd. (supra), the crucial question, which was left open was:

whether a corporation can be prosecuted for an offence, when the burden to prove the acts, constituting mens rea, is on the prosecution and the

cases, discussed hereinafter, will show how the grip of law was tightened on the corporate bodies with respect to crimes of intent.

46. The question, which was left open in Pearks, Gunston and Tee Ltd. (supra), was raised, once again, as noted by Viscount Caldecote, CJ, in

Director of Public Prosecutions Vs. Kent and Sussex Contractors Limited, reported in (1944) 1 K.B. 146, which I would shortly refer to.

47. Coming to yet another case, namely, Chuter vs. Freeth and Pocock Ltd., reported in (1911) 2 KB 832, we may note that the prosecution

therein was u/s 20(6) of the Sale of Food and Drugs Act, 1899. According to Section 20(6), every person, who, in respect of an article of food or

drug sold by him, gives to the purchaser a false warranty, in writing, shall be liable, on summary conviction, to a fine as therein mentioned, unless he

proves that when he gave the warranty, he had reason to believe that the statements or descriptions contained therein were true.

48. Having regard to the scheme of the enactment showing that every seller of drug was required to give warranty and the warranty, so given by

the seller, exposed the seller to prosecution if the statement, made in the warranty, was false and the seller failed to prove that he had believed the

statement made, or description given, in the warranty, was true, the Magistrate inferred, in Freeth and Pocock Ltd. (supra), that since the law

makes the person, who gives a false warranty, liable for prosecution unless he proves that when he gave the warranty "he had reason to believe"

that the statements or descriptions, contained in the warranty, were true, the expression "person", in section 20(6), must be construed to mean a

natural person, who is capable of forming a belief. Consequently, the Magistrate held that a corporation can not be made liable for such an offence,

because it is incapable of forming its belief.

49. Rejecting the above interpretation of the word "person", which occurs in Section 20(6), the Kings Bench remarked that the view, so taken by

the Magistrate, was too narrow a construction. The Kings Bench further observed, in Freeth and Pocock Ltd. (supra), that there is no reason as to

why a warranty should not be given by a corporation through its agents and when the warranty, so given by the corporation, contains false

statement, the corporation can be held liable unless the agent, who gave the warranty, is proved to have reasons to believe, at the time, when the

agent issued the warranty, that the statements given, or the descriptions contained, in the warranty, were true.

50. The relevant observations, made, with regard to the above, in Freeth and Pocock Ltd. (supra), by Lord Alver Stone, C. J., read:

.....the Magistrate has held that inasmuch as "the person", who gives a false warranty, is made liable unless he proves that when he gave the

warranty, "he had reason to believe" that the statements or descriptions contained therein were true, therefore "the person" cannot be construed as

including a corporation, but must be limited to natural person capable of belief. In my view that is too narrow a construction. Where a person is

capable of giving a warranty that person is liable to fine. There is no reason why a warranty should not be given by a corporation. It can give a

warranty through its agents, and through its agents, it can believe or not believe, as the case may be, that the statements in the warranty are true.

(Emphasis is added)

51. From what have been observed by Lord Alverstone, C. J., in Freeth and Pocock Ltd. (supra), it becomes clear that even as early as in 1911,

the courts, in England, had held that a "false warranty" can be given not only by a natural person, but also by a corporate body and, in this regard,

it was pointed out that a corporate body can give a warranty through its agents and through its agents, a corporate body can believe or not believe,

as the case may be, that the statements, made in the warranty, are true or not. In other words, what was pointed out, in Freeth and Pocock Ltd.

(supra), was that it is possible to attribute to a corporate body the knowledge of the person, who acts as an agent of the corporate body. The

decision, in Freeth and Pocock Ltd. (supra), also indicates, though, perhaps, faintly, that a corporate body can have, through its agent, not only

knowledge of a statement made falsely, but even criminal intent, in a given case, in respect of offences, such as, fraud.

52. The decisions noted above, in the light of yet another decision, in Mousell Bros., Ld. Vs. London and North Western Railway Co., reported in

(1917) 2 KB 836, would show that there arose a tendency to develop a new theory for holding the corporations guilty for crimes requiring mens

rea, but all these cases, too, contained traces of application of the principles of "vicarious liability", for, the crime was attributed to the corporation

through the agent''s conduct. Nonetheless, there was a new perspective in the sense that Courts began to inquire more into the criminal intent,

which hitherto was not done, because the principles of ''vicarious liability'' did not require any such exercise to be undertaken. However, the

decisions, which came hereafter would show that newer and concrete theoretical propositions were laid down by some authoritative decisions of

the English courts.

53. The cases of Law Society Vs. United Service Bureau Limited, reported in (1934) 1 K. B. 343, and Director of Public Prosecutions Vs. Kent

and Sussex Contractors Limited, reported in (1944) 1 K. B. 146, laid down that acts of willfulness and knowledge can be attributed to a

corporation. In the case of Law Society (supra), the Kings Bench held that the expression, ""willfully pretending to be a solicitor"", not only covers a

natural person, but also a corporate body inasmuch as a corporate body, too, is prohibited from practising without a certificate and since a

corporate body is not qualified to practice, as a solicitor, without requisite certificate, it can be penalized for having ''willfully'' pretended to be a

solicitor.

54. On the similar lines, it was held, in Kent and Sussex Contractors (supra), that a company can know or form an intention through its human

agents and, in a given case, knowledge or intent of a body corporate''s agent may be attributed to the body corporate. Hence, when the

responsible officers of a body corporate put forward a document knowing it to be false and intending that it should deceive, the knowledge and

intent of the officers must be imputed to the body corporate.

DEVELOPMENT OF IDENTIFICATION THEORY IN THE REALM OF CORPORATE CRIMINAL LIABILITY

55. Then comes one of the notable events in the history of corporate criminal liability with the decision in HL Bolton (Engg) Co. Ltd. Vs. T. J.

Graham and Sons, reported in 1956 All ER 624. The ''identification theory'', which we recognize today, is substantially an outcome of this

judgment, wherein Lord Denning held that a company may, in many ways, be compared to a human body, for, a company must be held to have a

brain and nerve center, which controls what the company does. Similarly, a company has the hands, which hold the tools and act in accordance

with the directions from the nerve center. However, some of the persons, in the company, are mere servants, who are nothing more than hands to

do the work and cannot be said to represent the mind or will of the company; but there are some others, such as, directors and managers, who

represent the directing mind and will of the company. Hence, in such circumstances, the state of mind of these directors or managers is the state of

mind of the company and is treated by law as such.

56. Thus, where law requires personal fault as a condition precedent for imposing criminal liability, the personal fault of the directors or managers,

in such cases, shall be treated as the personal fault of the company. Consequently, observed Lord Denning, in HL Bolton (Engg) Co. Ltd. (supra),

that where the law requires a guilty mind as condition of an offence, the guilty mind of the directors or the managers of a body corporate will render

the company guilty.

57. The foundation for the above observations of Lord Denning was laid down way back, in the year 1915, in the case of Lennard''s Carrying Co.

Ltd. v. Asiatic Petroleum Co. Ltd. (AC at pp. 713, 714), which appears to have had been overlooked in the decisions preceding HL Bolton

(supra).

58. In Lennard''s Carrying Co. Ltd. (supra), because of unseaworthy condition of the ship''s boilers, cargo had been destroyed by fire caused by

the ship''s boiler. The statutory provisions, which were, in question, namely, Section 2, excluded application of ''vicarious liability'' and the

provisions, contained in Section 502, were such as would apply only to an ''individual owner''. Notwithstanding the fact that Section 502 appeared

to involve an individual owner, Viscount Haldane, L. C., rejected the contention that Section 502 did not apply to company at all.

59. Having rejected the contention, Viscount Haldane, L. C., looked for the person, whose function, in the company, was same as those, which

could have been expected from an individual ship owner. The person, responsible for managing the condition of the ship, authorizing repairs, etc.,

was found to be Mr. Lennerd. As Mr. Lennerd was found to be both the ''mind and will'' of the company. Viscount Haldane, L. C., in his famous

and often quoted expression, described Mr. Lennerd as the ''directing mind and will'' of the company. Because of the fact that Mr. Lennerd was

found to be the directing mind as well as the will of the company, it was held that the company could not dissociate itself from him so as to say that

there was no actual fault or privity on the part of the company.

60. In Tesco Supermarkets Ltd. Vs. Nattrass, reported in (1971) 2 All ER 127, Lord Reid developed further the concept of criminal liability, by

pointing out that a living person has a mind, which can have knowledge or intention or be negligent and he has hands to carry out his intentions;

whereas a corporation has none of these and, consequently, the corporation must act through living persons, though the living person may not

always be one and the same. In such circumstances, such a living person is not living, speaking or acting for the company; rather, he is acting as the

company and his mind, which directs his acts, is the mind of the company. A company cannot be made vicariously liable in criminal law; hence, the

person, who is the mind behind the company, is not living, or acting as a servant, representative, agent or delegate; rather, he is an embodiment of

the company or, as put in Tesco Supermarkets Ltd. (supra), he hears and speaks through the persona of the company, within his appropriate

sphere, and his mind is the mind of the company. If it is a guilty mind, then, such guilt is the guilt of the company.

61. Lord Reid, however, points out, in Tesco Supermarkets Ltd. (supra), that there have been attempts to apply Lord Denning''s words to all

servants of a company, whose work is brain work, or who exercise some managerial discretion under the direction of superior officers of the

company, though Lord Denning, according to Lord Reid, did not intend to refer to such servants, whose work is brain work or who exercise some

managerial discretion under the directions of the superior officers of the company. Lord Denning, J., meant, according to Lord Reid, only those

persons, who ""represent the directing mind and will of the company, and control what it does.

62. In the later case of Meridian Global Funds Management Asia Ltd. Vs. Securities Commission, reported in (1995) 3 W. L. R. 413, a

contention was raised to segregate the mind from the will and it was argued that there is a possibility of the two aspects existing in two different

persons and when the ''directing mind'' of a company rests in one person, but the ''will'' of the company rests in other persons, then, the theory of

identification or attribution would not apply. In order to understand as to what was really contended in Meridian Global Funds Management Asia

Ltd.(supra), the facts of the said case are required to be carefully noted.

63. The facts, in brief, were thus: K, the chief investment officer of an investment management company, and N, its senior portfolio manager, with

the company''s authority, but unknown to the board of directors and managing director, used funds, managed by the company, to acquire shares in

a public issue. The company, thus, became, for a short period, a substantial security holder in that public issue, but the company did not give notice

thereof as was required by Section 20(3) of the Securities Amendment Act, 1988. The Securities Commission instituted proceedings, in the High

Court of New Zealand, against the company for failing to comply with Section 20. The High Court held that, for the purpose of Section 20(4)(e),

the knowledge of K and N should be attributed to the company. On this basis, the High Court declared that the company had committed breach

of its duty by not giving notice u/s 20 (3). The Court of Appeal of New Zealand upheld that decision on the basis that K was the directing mind

and will of the company and so his knowledge was attributable to the company. The company, then, appealed to the Judicial Committee.

64. In Meridian Global Funds Management Asia Ltd. (supra), it was contended that Investment Manager, Koo, is only the directing mind and not

the will of the company inasmuch as the will was that of the Board of the Company. It meant that according to the appellant, while one person can

be the mind of a corporate body, the will of the corporation may be its Board of Directors or some persons other than the person, who may be the

directing mind of the corporate body. In such circumstances, the company cannot be held liable for the acts of its investment manager, Koo, who

did the alleged act of investment without the will of the company inasmuch as the company remained completely in the dark about what its manager

had done.

65. The Privy Council points out, in Meridian Global Funds Management Asia Ltd. (supra), that any proposition about a company necessarily

involves a reference to a set of rules. A company exists, because there is a rule (usually in a statute), which says that a persona ficta shall be

deemed to exist, and to have certain of the powers, rights and duties of a natural person, but there would be little sense in deeming such a persona

ficta to exist unless there were also rules to tell one what acts were to count as acts of the company. It is, therefore, a necessary part of corporate

personality that there should be rules by which acts are attributed to the company and these may be called "the rules of attribution".

66. In Meridian Global Funds Management Asia Ltd. (supra), it has been pointed out that every act of a company cannot be expected to be

subject of resolution of the Board or a unanimous decision of the shareholders. In every case, therefore, it is a question of fact as to whether a

particular person is not only the directing mind, but will of the company. It has, however, been reiterated in Meridian Global Funds Management

Asia Ltd. (supra), that the determination of the question as to whether a natural person''s act is binding on a corporate body is nothing, but resort

to rule of attribution for the purpose of determining as to whether the natural person''s action can be treated as the will and directing mind of the

corporate body. In Meridian Global Funds Management Asia Ltd. (supra), it has been held that the phrase ''directing mind and will'' is not to be

understood in such a manner that the Court would start looking into the question as to whether a natural person was not only the directing mind of

an act, which has been done, but also the will of the company, meaning thereby, that as long as there is criminal intent in the mind of a natural

person and such a person is in control of the company, the criminal intent of such a natural person can be attributed to the company. It is not

necessary that the natural person, who is in control of the company, shall have the directing mind and also will of the company. It is enough if the

natural person concerned is the directing mind of the company and if such a person is in control of the company, then, his will be inferred as the will

of the company.

67. What has been noted above signifies the development of law, in England, with regard to corporate criminal liability and the position of law, in

England, to-day, is that there are some offences, which a corporation, being juristic person, is incapable of committing, such as, treason or murder,

which are punishable by death or imprisonment and not by any other means. A corporation can also not be indicted for an offence, which cannot

be vicariously committed, such as, perjury or bigamy. Subject to these exceptions, a corporation may be indicted and convicted for the criminal

acts of its directors and managers, who represent the directing mind and will of the corporation; and who control what the corporation does. The

acts and state of mind of such persons are, in law, the acts and state of mind of the corporation itself.

SHORTCOMINGS OF IDENTIFICATION THEORY

68. The shortcomings of ''identification theory'' lie in bringing the theory into reality. Theoretically, it is easy to conceive of a senior management and

in a given set of facts, a judge is to arrive at a finding whether the particular person, arraigned for the offence, falls within the category of senior

management or not; but in practice, it may be difficult to ascertain where the core lies; moreso, when the organisational nature of companies are

becoming complex day by day.

Illustration:

69. A company is considered a juristic person and its existence is independent of the people, who are its members. Thus, the members may come

and go, but the company remains. Hence, a situation may arise, when after committing acts of conspiracy, the persons, constituting the senior

management, resign in toto and a new management comes in. The question, therefore, would be, whether the new management, which has nothing

to do with the conspiracy, can be said to be the mind and will of the company?

DISTINCTION BETWEEN VICARIOUS LIABILITY AND IDENTIFICATION THEORY

70. The basic distinction, which is found, on an analysis of the cases referred to above, is the existence of two contrasting theories of corporate

criminal liability. When we speak of ''vicarious liability'', the wrongs begin from the agent below and carried to the Managing Authority at the top;

whereas, in ''identification theory'', the conspiracy ought to start from the top and spill over to the agents, who commit acts pursuant to such

conspiracy.

71. In case of a crime by corporation, which requires presence of mens rea, more than often, such accusation must also accompany an offence of

a conspiracy, for, it is difficult to conceive of a crime by a company without there being a design or plan to commit such an offence.

72. The underlying principles of knowledge and intent, which sum up a conspiracy, is indispensable requisite for holding a corporate body liable for

the crimes committed with intent. Be it fraud or cheating, the intent may be inferred from specific knowledge of practices, which the senior

management of the company undertakes.

CONCLUDING REMARKS ON THE MODELS OF VICARIOUS LIABILITY AND IDENTIFICATION

73. The application of the principles of "vicarious liability", as it exists today, may be difficult to indict a company for offence, such as, an offence of

conspiracy, for, a conspiracy has to start from the top and spill over to the agents, who commit acts pursuant to such conspiracy. Such a pattern in

the authority, which comes from the top and melts down to the executives, goes contrary to the principles of "vicarious liability", because, when we

speak of "vicarious liability", the wrongs begin, as already indicated above, from the agent below and carried to the Managing Authority at the top.

74. Therefore, it may be seen that for crimes, which require mens rea, a conspiracy and planning is necessary at the top level and the conspiracy is

materialized at the executive level and since the doctrine of "vicarious liability" fails to meet the situation, the "identification theory" seeks to

supplant the theory of "vicarious liability" in crimes requiring mens rea. "Identification theory" enables to locate the core, where the conspiracy was

planned and necessarily an agent cannot be said to be the core of the company. The core has to be the decisive authority, the senior management,

which clears plans and projects for the company to be executed by the agents.

75. Thus, in a way, the basic difference between the theory of "vicarious liability" and "identification theory" is that whereas, in the former, the

concentration is at the level of the agents, where the offence is committed and the culpability of the individual"s acts are imputed to the corporation,

the concentration, in the case of latter, is at the top level pursuant to which the offending act is committed by the agents.

SOME OTHER CONCEPTS TO HOLD CORPORATIONS CRIMINALLY LIABLE

Aggregation Theory

76. Over the past few decades, the corporation"s internal structures have been altered and expanded. Large modern corporations are no longer

set up with a clear, pyramid-like hierarchal structure of authority and power. On the contrary, modern corporations have multiple power centers

that have share in controlling the organization and setting its policies. The complexity of this new setting has created some challenges for the

imposition of criminal liability on corporations under the traditional approaches. Sometimes, power and influences are extremely diffused in the

corporation and it becomes, at times, almost impossible to isolate the responsible individual, whose intention could be attributed to the corporation

itself. The aggregation or collective knowledge doctrine was developed as a response to this puzzling scenario.

77. The ''aggregation theory'' is grounded in an analogy to tort law in the same way as the agency and identification doctrine. Under the

''aggregation theory'', the corporation aggregates the composite knowledge of different officers in order to determine liability. The company

aggregates all the acts and mental elements of the important or relevant persons, within the company, to establish whether, in toto, they would

amount to a crime if they had all been committed by one person. According to Celia Wells, ""aggregation of employees'' knowledge means that

corporate culpability does not have to be contingent on one individual employee''s satisfying the relevant culpability criterion"".

78. The ''theory of aggregation'' is a contribution of the American Federal Courts to the subject of corporate criminal liability.

79. The ''aggregation theory'' can be best understood from the facts of the case involved in United States v. Bank of New England, 821 F.2d 844.

In this case, the Bank was found guilty of having failed to file CTRs (currency transactions reports) for cash withdrawals higher than $10, 000. The

client made thirty-one withdrawals on separate occasions between May 1983 and July 1984. Each time, he used several checks, each for a sum

lower than the required total, none of which amounted to $10, 000. Each check was reported separately as a singular item on the Bank''s

settlement sheets. Once the checks were processed, the client would receive in a single transfer from the teller, one lump sum of cash, which

always amounted to over $10,000. On each of the charged occasions, the cash was withdrawn from one account. The Bank did not file CTRs on

any of these transactions. Each group of checks was presented to a different teller at different times.

80. The question, which arose, in Bank of New England (supra), was, if any knowledge and will could be attributed to the corporate entity. The

trial judge found that the collective knowledge model was entirely appropriate in the context and observed that if the Bank is looked as an

institution, its knowledge is the sum total of all the knowledge of all its employees. That is, the bank''s knowledge is the totality of what all of its

employees knew within the scope of their employment. So, if employee A knows of one facet of the currency reporting requirement, B knows

another facet of it, and C a third facet of it, the banks know them all. So, if it is found that an employee, within the scope of his employment, knew

that the [reports] had to be filed, even if multiple checks are used, the bank is deemed to know it if each of the several employees knew a part of

the requirement and the sum of what the separate employees knew amounted to the knowledge that such a requirement existed.

81. The proponents of collective knowledge explain that the difficulty of proving knowledge and willfulness in a compartmentalized structure, such

as, a corporation, should not be an impediment to the formation of the corporation''s knowledge as a whole. According to these proponents, it is

not essential that one part be aware of the intention and act of the other part for the formation of aggregate knowledge.

82. In Bank of New England (supra), it was explained that:

Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of

those components constitutes the corporation''s knowledge of a particular operation. It is irrelevant whether employees administering one

component of an operation know the specific activities of employees administering another aspect of the operation.

83. The ''aggregation theory'' appears to combine the ''respondent superior'' (vicarious liability) principle with one of ''presumed or deemed

knowledge''. Even if no employee or agent has the requisite knowledge to satisfy a statutory requirement needed to be guilty of a crime, the

aggregate knowledge and actions of several agents, imputed to the corporate executive, could satisfy the elements of the criminal offence.

84. In spite of the wide interpretation of the ''aggregation theory'' employed in Bank of New England (supra), American courts have been careful

with the application of this ruling, because there has been a view that the attribution of mens rea or intent or recklessness to a corporation

necessarily depends on the full development of this culpable state of mind in one of the corporation''s employees. Contrary to the decision, in Bank

of New England (supra), American courts have been, generally, of the view that a corporation cannot be deemed to have culpable state of mind,

when that state of mind is not possessed by a single employee. This goes quite close to the contentions, which were raised, but not accepted, in

Meridian Global Funds Management Asia Ltd. (supra), wherein the Judicial Committee pointed out that the expression, ""directing mind and will"", is

not metaphysics and it is not to be understood to mean that the Court would start looking into the question as to whether a natural person was not

only the "directing mind" of an act, which has been done, but also the "will" of the company.

85. The "aggregation theory" came to be questioned in the case of Inland Freight Lines vs United States 191 F.2d 313, wherein it was clarified

that corporate collective knowledge and collective criminal intent do not necessarily have the same meaning. In fact, this case, perhaps, stands out

as one of the lone cases in the legal history of United States, where not only "aggregation theory", but also the theory of "vicarious liability" has not

been considered to penalize the company, for, on the facts of the case, the conviction of the company could have been sustained on the principles

of "vicarious liability".

86. The case, Inland Freight Lines (supra), arose out of violation of Title 49, Section 304(a), United States Code Annotated, which empowered

the Interstate Commerce Commission to require motor carriers, subject to the provisions of the Interstate Commerce Act, to keep, maintain, and

preserve uniform systems of accounts, records, and reports; and Section 322(g) makes it a misdemeanor for a carrier to knowingly and wilfully

prepare, keep, and preserve false records in connection with the operation of its business. Regulation 191.5, promulgated by the Commission,

provides that each carrier shall require that a driver"s log, in duplicate, shall be kept by each driver in his employ, who operates a motor vehicle

engaged in transportation in interstate commerce, and that entries, in the log, shall show the place of origin and destination of the trip, the times of

reporting for duty and going off duty, the periods of driving and operating and other work, and any other information found desirable.

87. It was alleged that the company aided, abetted, counseled, commanded, and induced, to prepare and keep, a driver"s log in connection with

such operation and transportation containing false entries. The company was found guilty on each of such counts and the sentence imposed was a

fine of $1,000 on each count.

88. On appeal, the Judge found that the logs and the reports did not find their way into the hands of a single agent or representative of the

company after they were filed. No single agent or representative, in the offices of the company, had actual knowledge of their conflicts and falsities.

But one agent or representative had knowledge of the material contents of the logs and another had knowledge of the material contents of the

reports and this collective knowledge of both agents and representatives was attributed to the company.

89. It was further observed that willfulness is a question of fact. It may be inferred from acts, conduct, and circumstances and the inference may be

drawn from a combination of acts, conduct, and circumstances. It was incumbent upon the Government to show that the company "knowingly and

willfully" kept, maintained and preserved false logs as part of its records. The Appellate Judge found that instructions to the Jury, by the Trial

Court, omitted the word willfulness and, hence, the Trial Court came to the finding that negligence, on the part of the company, in accepting the

false logs, without investigation, as to their falsity, were sufficient to warrant a conviction was erroneous. The convictions of the company was set

aside on the ground that, in order to warrant a conviction under the statute, the false logs must have been "knowingly" and "willfully" kept and

preserved as records of the company. The term "willful" or "willfully" as used means the keeping of them deliberately, voluntarily, or intentionally as

distinguished from inadvertence or ordinary negligence.

WHICH THEORY HAS INDIA ADOPTED TO FASTEN CRIMINAL LIABILITY ON THE CORPORATE BODIES ?

90. So far as the history of corporate criminal liability, in Indian judiciary, is concerned, one of the earliest reported cases is of State of

Maharashtra Vs. Syndicate Transport Co. (P) Ltd. and Others, , wherein a complaint was lodged against a Company, its Managing Director, its

other directors and one shareholder, Manohar, for alleged offences u/s 420 and 406 or 403 of the Indian Penal Code. The trial Magistrate passed

a separate order discharging the Directors and framed charges for offence of cheating u/s 420 Indian Penal Code against the Company, its

Managing Director, Chintaman, another director, Harinarayan, and the shareholder, Manohar.

91. In Syndicate Transport Co. (P) Ltd. (supra), the Bombay High Court, on considering the cases of Director of Public Prosecutions v. Kent and

Sussex Contractors (supra) and Rex v. I. C. R. Haulage, Ltd. 1944 1 KB 551, held that even if the allegations, in the complaint, are taken to be

true, that would not warrant any direction to the Magistrate to proceed against the company u/s 406 or 403 Indian Penal Code. The complaint did

not allege that the Managing Director or Board of Directors had made the dishonest representation or had received the monies or had authorised

the shareholder, Manohar, to make such a representation as Manohar did or to receive the amount. On the contrary, the allegations, in the

complaint, only showed that the alleged dishonest representation and the alleged receipt of the amount were by a mere shareholder, who was a

stranger so far as the administration of the company, was concerned. There were no allegations, in the complaint, that act of cheating was done on

the authority of the managing director. There was also nothing to show that the board of directors had passed any resolution for making a dishonest

representation. Under these circumstances, the alleged false or dishonest representation or the alleged dishonest misappropriation could not be

attributed to company.

92. The findings of the Syndicate Transport Co. (P) Ltd. (supra) are interesting in the sense that it referred to those cases, which had considered

the concepts of ''vicarious liability'' for attributing criminal intent to the corporate bodies, but ultimately based its findings on the concept of

''directing mind and will'' as recognized in the case of HL Bolton''s case (supra). It needs to be pointed out here that HL Bolton (supra) does not

appear to have been noticed by the Bombay High Court in this case. The High Court did not rule out the possibility of a corporate body being

convicted for a crime with intent, but decided that on the facts of the case, no prosecution of the company was permissible. In a sense, this

decision could have been a pioneer on the law of corporate criminal liability in India, but as we shall see, in our forthcoming discussion, the

confusion still pervades the Indian judiciary.

93. Later, in the line is the case of M.V. Javali Vs. Mahajan Borewell and Co. and Others, . In this case, there was complaint, in the Special

Court, for Economic Offences, at Bangalore, alleging commission of an offence u/s 276B, read with section 278B, of the Income Tax Act, 1961,

by the accused M/s Borewell. & Co., a registered partnership firm and its three partners.

94. To answer the question whether a company, being a juristic person and, thus, incapable of being sentenced to imprisonment, can be

prosecuted - and for that matter convicted - for committing an offence under the Income Tax Act, which provides for compulsory imprisonment

and fine, the Supreme Court referred to the provisions of the 276B, read with section 278B, of the Income Tax Act, 1961, with which the Court

was concerned in the appeal and held that even though the offences prescribe mandatory punishment of imprisonment and fine, it would not be a

bar to prosecute the company and it was further held that when a statute prescribes imprisonment with fine as punishment and the offender is a

company, it is justified for a Court to award a sentence of fine alone. The relevant observations, in M.V. Javali (supra), read, ""that the only

harmonious construction that can be given to Section 276B is that the mandatory sentence of imprisonment and fine is to be imposed, where it can

be imposed, namely, on persons coming under categories (ii) and (iii) above, but where it cannot be imposed, namely, on a company, fine will be

the only punishment"".

95. In M.V. Javali''s case (supra), the concentration of the Supreme Court was on the maintainability of the prosecution in the light of the

mandatory punishment provided for the offences alleged; hence, the Supreme Court, in M.V. Javali''s case (supra), it had not discussed, whether

crimes with mens rea can be committed by corporate body nor was there any discussion on the models of ''vicarious liability'' or ''identification''.

96. The question of mens rea arose in Kalpanath Rai vs. State (AIR 1998 SC 201). In this case, M/s. East West Travel and Trade Links, Ltd, a

company, was accused of harbouring terrorist and accordingly, it was prosecuted under TADA. The trial Court sentenced the company to a fine

of Rs 50, 00,000/-.

97. The first question posed by the Supreme Court was whether the offence, u/s 3(4) of the TADA, required mens rea, which the Supreme Court

answered in affirmative. Having answered in the affirmative that an offence u/s 3(4) is not complete without mens rea, the question, which the

Supreme Court faced was whether a company could have been prosecuted for the offence, which required mens rea. The Supreme Court

returned its findings, in the negative, in the following words:

58. On the above understanding of the legal position we may say at this stage that there is no question of A-12 - company to have had the mens

rea even if any terrorist was allowed to occupy the rooms in Hotel Hans Plaza. The company is not a natural person. We are aware that in many

recent penal statutes, companies or corporations are deemed to be offenders on the strength of the acts committed by persons responsible for the

management or affairs of such company or corporations e.g. Essential Commodities Act, Prevention of Food Adulteration Act etc. But there is no

such provision in TADA which makes the company liable for the acts of its officers. Hence, there is no scope whatsoever to prosecute a company

for the offence u/s 3(4) of TADA. The corollary is that the conviction passed against A-12 is liable to be set aside.

98. The findings of the Supreme Court, in Kalpanath Rai''s case (supra), if examined closely, reveal that the accused appellant, M/s. East West

Travel and Trade Links Ltd, was acquitted on the sole ground that it was a company and not a natural person and though it can commit crimes,

which have been statutorily made punishable under certain special laws, on the basis of the principle of strict liability, it is not possible for a juristic

person, such as, a company, to commit an offence, which needs mens rea.

99. Thus, in no uncertain words, laid down the Supreme Court, in Kalpanath Rai''s case (supra), that an offence, necessitating presence of mens

rea, cannot be committed by a juristic person. Until Kalpanath Rai''s case (supra), there was no authority pronouncement, in India, by the Supreme

Court on this aspect of law. The law, therefore, which stood, in the light of Kalpanath Rai''s case (supra), established, in India, as late as in the year

1998, was that a corporate body cannot be prosecuted for an offence, which requires proof of mens rea.

100. Then comes the famous case of The Assistant Commissioner, Assessment-II, Bangalore and Others Vs. Velliappa Textiles Ltd. and Others, .

In this case, two of the questions, among others, which, arose in the Supreme Court, were:

(i) Whether a company can be prosecuted if the relevant provisions of law contemplate only corporal punishment and not fine, or is it possible to

sentence a company to pay fine alone, when the relevant provisions of law prescribe a minimum period of imprisonment and payment of fine as

punishment?

(ii) Whether mens rea can be attributed to a company, which is a juristic person, on the basis of the acts done by the person, who was in-charge of

the affairs of the company and responsible for running the business of the company?

101. As regards the first question, which arose in Velliappa Textiles Ltd. (supra), namely, whether a company can be prosecuted for an offence,

which is punishable by imprisonment and not fine, or when an offence entails a minimum prescribed period of imprisonment and fine, the opinion of

GP Mathur, J, was that it is permissible in law to prosecute a company for an offence, which is punishable mandatorily not only by fine, but also by

imprisonment. The majority view, however, as expressed by Dr. S. Rajendra Babu, J., (as his Lordship, then, was) and BN Srikrishna, J. was that

prosecution, in such a case, was not legally possible, for, it is not possible to imprison a juristic person and since sentence of imprisonment cannot

be imposed on a juristic person, prosecution of a juristic person for an offence, which prescribes corporal punishment, with or without fine, is

legally not feasible.

102. Thus, what the majority, in Velliappa Textiles Ltd. (supra), held was that where punishment provided is mandatory imprisonment and fine, the

Court cannot impose only fine and, hence, a company cannot be prosecuted for an offence, which prescribes only corporal punishment or

prescribes mandatory term of imprisonment coupled with fine.

103. The above view of the majority, as expressed, in Velliappa Textiles Ltd. (supra), came to be doubted in ANZ Grindlays Bank Ltd. and

Others Vs. Directorate of Enforcement and Others, , while deciding the maintainability of a prosecution under FERA. The relevant observations

read:-

2. In support of the said contention reliance has been placed on a recent three-Judge Bench decision of this Court in Assistant Commissioner,

Assessment-II, Bangalore and Ors. v. Velliappa Textiles Ltd. We do not prima facie agree with the ratio laid down in Velliappa Textiles Ltd.

(supra).

3. .....In the event it is held that a case involving graver offence allegedly committed by a company and consequently the persons who are in

charge of the affairs of the company as also the other persons cannot be proceeded against, only because the company cannot be sentenced to

imprisonment, in our opinion, would not only lead to reverse discrimination but also go against the legislative intent. The intention of the Parliament

is to identify the offender and bring him to book.

[Emphasis is added]

104. The matter was, therefore, referred to a Constitution Bench. The reference decided, in Standard Chartered Bank and Others etc. Vs.

Directorate of Enforcement and Others etc., , too, rendered a split decision. The majority, speaking through K. G. Balakrishnan, J (as his

Lordship, then, was), while overruling Velliappa Textiles Ltd. (supra), observed that;

As the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed

punishment the court can impose the punishment of fine which could be enforced against the company. Such discretion is to be read into the

Section so far as the juristic person is concerned. Of course, the court cannot exercise the same discretion as regards a natural person. Then the

court would not be passing the sentence in accordance with law. As regards company, the court can always impose a sentence of fine and the

sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the

legislature and we find no difficulty in construing the statute in such a way. We do not think that there is blanket immunity for any company from

any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment.

105. Now that the cases from MV Javali (supra) to Standard Chartered (supra) have been discussed, the subtle distinction in these cases also

needs to be discussed.

106. In M.V Javali (supra), the ratio laid down was that when a company is prosecuted for an offence, which attracts mandatory imprisonment

with fine, the prosecution is not barred merely because a sentence of imprisonment cannot be imposed and, hence, in such cases, a sentence of fine

is permissible.

107. In Kalpnath Rai (supra), the ratio was that since an offence u/s 3(4) of TADA requires presence of mens rea, a company is inherently

incapable of having mens rea and cannot, therefore, be prosecuted for an offence, which requires mens rea.

108. In Velliappa Textiles (supra), the ratio, per majority view, was that if the offence prescribes a mandatory imprisonment or mandatory

imprisonment with fine, the prosecution of a company is not permissible, for, it would be against the legislative intent to waive imprisonment and

impose fine only.

109. It needs to be, however, borne in mind that the offence, involved in Velliappa Textiles (supra), required presence of mens rea and the

Supreme Court held, per majority, that the prosecution of a company is permissible for offences requiring mens rea. The majority, in Velliappa

Textiles (supra), while taking the view that it is possible to prosecute a company for an offence, which requires mens rea, referred to a large

number of decisions of the Courts, in UK as well as America, but did not clearly lay down as to which theory, between the two, namely, ''vicarious

liability'' and ''identification theory'', shall be applied to India, perhaps, because no such arguments were advanced.

110. In fact, in Velliappa Textiles (supra), the Court did not clearly point out the distinction between the American Courts and the Courts, in

England, in holding the companies responsible for commission of offences involving mens rea. At any rate, what is extremely important to note is

that the majority, in Velliappa Textiles (supra), on the question of mens rea, as indicated hereinbefore, was reached by two Judges, Dr. Rajendra

Babu, J (as his Lordship then was), taking a contrary view.

111. Thus, Kalpnath Rai''s case (supra) as well as Velliappa Textiles''s case (supra) took two distinctly different views on the question of mens rea

so far as its application, as against the corporate bodies, is concerned in the sense that while the Supreme Court, in Kalpnath Rai (supra), clearly

took the view (as late as in 1998) that a corporate body cannot be prosecuted for an offence involving mens rea, the view, taken, in Velliappa

Textiles (supra), in the light of the developments, world over, in the field of criminal law, was that a company can be prosecuted for an offence,

which involves mens rea; but it was not clearly held as to which of the two theories, namely, the theory of ''vicarious liability'' and the ''identification

theory'', shall be applied in India.

112. In fact, while the cases, involving both the theories, were referred to in Velliappa Textiles (supra), the Court did not specifically draw the

distinction between the two theories. It, however, appears, on microscopic examination, that the majority opinion, as expressed by Mathur, J, and

Srikrishna, J, in Velliappa Textiles Ltd. (supra), was that a corporate body, though a juristic person, can be prosecuted for an offence, which

involves mens rea as an ingredient inasmuch as the acts and state of mind of a person, who functions as the ''directing mind and will'' of the body

corporate and controls its function, shall, in law, be attributed to the corporate body and the acts and guilty state of mind of such a person shall be

treated as the acts and state of mind of the body corporate itself. It is, thus, the ''identification theory'', which appears to have found favour with the

majority in Velliappa Textiles (supra).

113. In short, a corporate body, according to the majority view, in Velliappa Textiles Ltd. (supra), can be prosecuted for an offence, which

requires mens rea as its ingredient; but the minority view, as expressed by Dr. Rajendra Babu, J, was that mens rea, as an element of offence,

cannot be attributed to a company, because a company is a juristic person and it cannot be punished for an offence, which requires mens rea or

criminal intent. In effect, what the observations of Dr. Rajendra Babu, J, reflect is that while it is possible to make a company criminally liable for an

offence, which can be attributed to have been committed by a company by neglecting the requirements of law, it is not possible to prosecute a

company for an offence, which would require positive criminal state of mind, for, such a criminal state of mind cannot be attributed to a company,

which is a juristic person.

114. Then came the case of ANZ Grindlays Bank Ltd. and Others Vs. Directorate of Enforcement and Others, . The matter involved was

violation of FERA and attracted mandatory imprisonment with fine. Disputing the ratio, laid down, in the case of Velliappa Textiles (supra), that a

company cannot be prosecuted for an offence, which prescribes mandatory corporal punishment with fine, the matter was referred to a

Constitutional Bench. The judgment of the Constitution Bench, reported in Standard Chartered Bank and Others etc. Vs. Directorate of

Enforcement and Others etc., , overruled the ratio laid down in Velliappa Textiles (supra), and answered the ''reference'' by holding that there is no

immunity for a company merely because penalty is mandatory imprisonment.

115. In the ''reference'', the Supreme Court did not finally lay down that prosecution of a company is permissible for an offence, which requires

mens rea; rather, it left the question wide open for decisions to follow. Thus, the decision, in Standard Chartered''s case (supra), is an authority, in

India, for the proposition that a company can be prosecuted for an offence, which prescribes, as punishment, mandatory imprisonment with fine,

for, a corporate body, in such a case, according to what Standard Chartered''s case (supra) lays down, is punishable by imposition of ''fine'' alone.

116. The brief summary of what has been pointed out above would reveal that there are two cases, wherein the question of mens rea has emerged

and has been decided, namely, Kalpnath Rai (supra) and Velliappa Textiles (supra). The views are conflicting in nature; whereas Kalpnath Rai

(supra) says that it is not permissible to prosecute a company for offence requiring mens rea, the case of Velliappa Textiles (supra) says that such a

prosecution is permissible. The case of Velliappa Textiles (supra), being at a later point of time, and, it having taken note of the development of law

on criminal liability of corporate bodies, has to be treated as the subsequent view of the Supreme Court in the matter, particularly, when the

majority opinion, rendered in Velliappa Textiles Ltd. (supra), was not disturbed by the Constitution Bench in Standard Chartered (supra). If,

therefore, the question arises whether it is permissible for a company to be prosecuted for an offence involving mens rea, the answer has to be in

the affirmative and the ratio of Velliappa Textiles (supra) may, perhaps, be applied in this regard.

117. The cases of S.K. Alagh Vs. State of U.P. and Others, , and Maksud Saiyed Vs. State of Gujarat and Others, , also need to be mentioned in

this context. In both these cases, the Supreme Court was considering arguments on the maintainability of prosecution of Managing Directors of

corporate bodies for offences, under the Indian Penal Code, which require mens rea. In both the cases, it was held that Indian Penal Code does

not contain any provision for attracting "vicarious liability" of the Managing Director or of the Directors of a company, when the accused is a

company. It further observed that the question of "vicarious liability" of the Managing Director and Director would arise only if any provision exists

in that behalf in the statute. Apart from the fact that a statute must contain provisions fixing such vicarious liability, it is also obligatory, on the part of

the complainant, to make requisite allegations, which would attract the provisions constituting vicarious liability.

118. In Maksud Saiyed (supra) and S.K. Alagh (supra), the view, taken by the Supreme Court, is that the Indian Penal Code, having not made

any provision making a Managing Director or a Director of a corporate body liable for an offence committed by a corporate body, it is not

possible to prosecute a Managing Director or Director of a corporate body for an offence, which requires mens rea. The cases of Maksud Saiyed

(supra) and S.K. Alagh (supra) do not, however, decide as to how a corporate body can commit an offence involving mens rea as its ingredients

nor do these two cases, namely, Maksud Saiyed (supra) and S.K. Alagh (supra), have taken note of the fact that a corporate body, not having a

mind of its own, cannot commit an offence, involving mens rea, without the help of a human agency.

119. The case of Maksud Saiyed (supra) has adopted the theory of vicarious liability to make the companies criminally liable, even though the

complaint, in question, was, amongst others, under Sections 470 and 471 of IPC, which require presence of mens rea. It has been further held that

in order to maintain a complaint against a body corporate, two conditions are essential;

(i) There must be provisions in the statute fixing such vicarious liability: and

(ii) Complainant must make requisite allegations which would attract the provisions constituting vicarious liability

120. In view of the decision laid down in the case of Maksud Saiyed (supra), it would, perhaps, never be permissible to prosecute a company for

an offence under the Penal Code, because the Indian Penal Code does not contain any specific provision fixing vicarious liability on the Managing

Director or any other Officer in the hierarchy of a company.

121. In the case of SK Alagh (supra) the Supreme Court has relied, on the case Maksud Saiyed (supra), in coming to its conclusion and per se

does not lay down an independent precedent.

122. At any rate, what must be borne in mind, in the light of the decisions in Maksud Saiyed (supra) and S.K. Alagh (supra), is that for offence,

created and made punishable by the Indian Penal Code, any natural person, such as, Director or Managing Director, cannot be held liable for the

offence committed by his company inasmuch as there is no provision in the Indian Penal Code making a person vicariously liable.

123. We may, now, turn to the recent case of Iridium India vs Motorola Inc., reported in 2010 (11) SCALE 417, wherein a two Judge Bench of

the Supreme Court, while deciding a case relating to quashing of a complaint against a company, which had been accused of having committed

offences of criminal conspiracy, cheating and criminal breach of trust, held that the prosecution was permissible. While considering Iridium India''s

case (supra), it deserves noticing that this case refers to the decision, in Standard Chartered (supra), as an authority for the proposition that a

corporate body can be prosecuted for an offence, which involves mens rea. Dr. Saraf, learned Senior counsel, points out that Standard Chartered

(supra) has not finally laid down that prosecution of a company is maintainable for an offence involving mens rea. Far from this, this question,

further points out Dr. Saraf, having been noticed, was left open inasmuch as K. G. Balakrishnan, J (as his Lordship then was), observed, ""It is only

in a case requiring mens rea, a question arises whether a corporation could be attributed with mens rea to prove the guilt. But as we are not

concerned with the question in these proceedings, we do not express any opinion on that issue.

(Emphasis added)

124. Standard Chartered (supra) is, therefore, according to Dr. Saraf, not an authority for the proposition that a corporate body can be punished

for an offence, which requires mens rea. Be that as it may, Iridium India''s case (supra) is a case involving offences, which have mens rea as their

ingredients. There can, therefore, be no escape from the conclusion, in the light of the decision, in Iridium India''s case (supra), that the Indian

Supreme Court has clearly taken the view therein that a corporate body can be prosecuted for offences involving mens rea.

125. Thus, while Iridium India''s case (supra) may have inadvertently placed reliance on the case of Standard Chartered (supra) as an authority to

hold that a corporate body can be prosecuted for an offence involving mens rea, it, nevertheless, lays down that a corporate body can be

prosecuted for an offence involving mens rea and this is what we are presently concerned with.

126. We, therefore, have, now, two different principles of law in India. One laid down in Maksud Saiyed and adopted in SK Alagh that unless the

statute prescribes provisions fixing liabilities of company, the company cannot be prosecuted for offences under the Penal Code involving mens rea

and on the other hand we have the law, laid down in Iridium India''s case (supra), which also involves an offence under the Penal Code for

offences requiring mens rea, that a corporate body can be prosecuted, in India, for an offence requiring mens rea as its ingredients.

127. What, however, remains to be decided is which of the two prominently accepted theories, namely, the theory of identification and theory of

vicarious liability would operate in India and, in this regard, one has to clearly bear in mind that Indian Penal Code, in the light of the decisions in

Maksud Saiyed (supra) and S.K. Alagh (supra), do not make a person, such as, a corporate body liable by resorting to the theory of vicarious

liability.

128. What has been overlooked over the years is the fact that simply impleading a corporate body as an accused and relying on the principle, that

corporate bodies can be prosecuted for offences requiring mens rea, is not sufficient to launch prosecution against a corporate body. At the end of

the trial, assuming the case is proved, the question would arise, who is to be penalized and how to enforce the penalty. When we use the word

Court, it is inherent in the term that its orders are enforceable and not merely directory. Thus, it becomes necessary that the dock meant for the

accused sees the presence of a natural person, who, as observed in the case of R.S. Sodhi and Another and Manoranjan Pani and Others Vs.

Partha Pratim Saikia, , is not standing in his personal capacity, but represents the embodiment of company. In other words, conviction of a natural

person becomes necessary to penalize a company. If we adopt the ''vicarious liability'' model, then, the acts of agent would suffice to penalize the

company; but, if we act on the identification model, the natural person has to be ''directing mind and will'' of the company, or to say, a sufficiently

senior person in the hierarchy of the company.

129. In the case of R.S Sodhi (supra), the facts alleged were that the complainant had sent four demand drafts amounting to Rs. 11, 75,000/- in

favour of the accused Federation, but the accused persons, instead of sending the goods, allegedly misappropriated the said amount and thereby

committed offences of criminal misappropriation, cheating and criminal conspiracy under Sections 406/ 409/ 420/ 120B/ 34 IPC.

130. After having traversed the history of the corporate criminal liability, the Court held that the prosecution of accused federation would have

been permissible had there been an allegation to that effect. The relevant observations are as follows:

150. it is possible to prosecute a company along with its director or managing director for an offence involving mens rea as its ingredient, such as,

an offence u/s 406 IPC, if the criminal state of mind of the natural person, such as, a the director or managing director, is attributable to the

company. In such a case, the natural person is prosecuted not because of the fact that he is the director or managing director of the company, but

because there is no real difference between him and his company inasmuch as he is the mind and will of the company and his decision is the

decision and will of the company. The logical extension of this conclusion is that a person cannot be prosecuted for an offence of criminal breach of

trust, u/s 406 IPC, committed by his company, merely because he happens to be the director of the company; but when there is no real and

substantive difference between him and his company and when his criminal state of mind is attributable to his company, such a natural person''s

prosecution, even for an offence u/s 406 IPC, along with his company, is permissible.

131. Apart from the aforementioned observations, there arose yet another issue in the case of R.S Sodhi (supra), which Dr. Saraf has referred to.

The question before this Court was: whether it is possible to prosecute a company or association or body of persons for any offence, under the

Indian Penal Code, if such an offence involves mens rea as its essential ingredient? In order to answer this question, the words "whoever" and

''he'', appearing in section 415 IPC, required an interpretation.

132. Interpreting Section 11 IPC, which defines the word ''person'', the Court, in R.S Sodhi (supra), held that the definition is not exhaustive, but it

is inclusive. The word ''person'', thus, meant not only a natural person, such as, a man, woman, or child, but also an artificial person or a juridical

person like a company or corporation.

133. It has been further held, in R S Sodhi (supra), that the aim of the Indian Penal Code is made explicit by its preamble, which indicates that the

Indian Penal Code was enacted as a general Penal Code for India. Necessarily, therefore, Section 2 IPC and also various definitions, contained

under Chapter-II of the Indian Penal Code, have to be read subject to the context in which the word ''person'' has been used. No wonder,

therefore, that it may not be possible to prosecute a company for committing offence, such as, murder or rape, but a company''s prosecution for

offences, such as, cheating or criminal breach of trust, cannot be said to be beyond the scope of the Indian Penal Code. Yet another reason why

Section 405 or 415 IPC must be read to include, and be applicable to, a company, as an offender, is that Section 415 uses the word "he", while

referring to the "person", who may be deceived. If the word "he" is treated to refer to only a natural person, then, a company, though a person, in

the light of Section 11 IPC, would have no remedy against a "person", who may commit the offence of cheating against the company nor would a

company be entitled to prosecute its servant if its servant dishonestly misappropriates the property entrusted to him by the company as his

employer unless the word, "he", is taken to include a corporate body.

134. If the case of the Iridium India (supra) proceeds and ends up in the conviction of the company, a question would naturally arise: whether the

right natural person, representing the company, had stood in the dock or not. If the person was only an agent of the company, then, the conviction

would be permissible only by the application of the principle of "vicarious liability" and if the natural person was a senior member, in the hierarchy

of the company, the "identification model" must be treated to have been adopted. Since such a question has not been decided authoritatively by the

Supreme Court, in India, till date, it may have an adverse bearing on the trial of corporate bodies for offences involving mens rea.

LEGALITY OF THE IMPUGNED ORDER IN THE LIGHT OF RELEVANT LAWS DISCUSSED HEREINBEFORE

135. In the light of the position of law, with regard to quashing of a complaint or a first information report and the criminal liability of a company,

what needs to be noted, when I revert to the case at hand, is that the complainant claims to have purchased the Laser Printer, when a Scheme of

the accused No. 1, namely, M/S Samsung India Electronic Private Limited Company, was in force, which provided for supply of a free toner to

the purchaser of the Laser Printer of the model, which the complainant had purchased. While this fact is not in dispute, the petitioners have

submitted to the effect that the Scheme, provided to the customers for purchasing the Laser Printer, required the purchaser to register, for the

Scheme, on the website of Samsung by filling up, in this regard, a Registration Form and, thereafter, send the Registration Form and original MRP

sticker, along with a Demand Draft of Rs. 250/-, to petitioner No. 1. All cases, under the Scheme, according to the petitioners, were processed by

an agency, namely, Zed Axis. There were several discrepancies in the information sent by the complainant-respondent No. 2 inasmuch as the serial

number of the Printer, as provided by the complainant, did not exist in the valid serial number data base provided by petitioner No. 1 and hard

copy of the filled in Registration Form of the Scheme, at website, was not attached. The agency concerned did not notice the said discrepancies

and failed to put the complainant''s case in the rejection list, but the complainant was intimated about such rejection later on. However, without

prejudice to the rights and contentions of the petitioners and in order to set the controversy at rest, the toner was offered to the complainant-

respondent No. 2; but he refused to accept the same and made illegal demands of a free Home Theatre System and LCD as a pre-condition for

settling the controversy. On 29-03-2008, the accused-petitioner No. 1, namely, the company, again, sent to complainant-respondent No. 2 the

toner, which had been duly received at the address of the complainant-respondent No. 2.

136. Though the refusal to accept the offer, which had been given by the accused-petitioner No. 1 to the complainant, may not absolve the

accused-petitioners from criminal liability, if they were, otherwise, liable, the fact of the matter remains that the complaint does not disclose any

ingredients of criminal breach of trust inasmuch as there was no entrustment of any property, from the end of the complainant, which was either in

the possession of the complainant or which was under the dominion of the complainant. When there was no entrustment of the free toner by the

complainant-respondent No. 2 to the accused-petitioners, which the Scheme, in question, was to provide, the question of commission of offence

of criminal breach of trust did not arise at all and the learned Court below, without determination of the question as to whether the complaint, in

question, had disclosed ingredients of the offence of criminal breach of trust, as embodied in Section 405 IPC, directed issuance of process, under

the said penal provisions, i.e. Section 406 IPC, to the present petitioners, as accused. Thus, the issuance of processes, u/s 406 IPC, is wholly

illegal.

137. Turning to the question as to whether the complaint, in question, discloses commission of offence of cheating, it needs to be noted that

cheating is defined, as already mentioned above, u/s 415 IPC, whereunder whoever, by deceiving any person, fraudulently or dishonestly, induces

the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the

person so deceived to do or omit to do anything, which he would not do or omit if he were not so deceived, and which act or omission causes or

is likely to cause damage or harm to that person in body, mind, reputation or property, is said to ''cheat''.

138. I have already pointed out above, in this regard, that in a case of cheating, the intention of the accused has to be dishonest from the very

commencement of the prosecution and, as a matter of fact, there is really no consent by the person, who is intentionally induced by deception to

deliver the property or allow any person to retain the property or is intentionally induced, as a result of deception, to do or omit to do anything,

which he would not do or omit to do if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that

person in body, mind, reputation or property. Why it is said that there is no consent, in the eyes of law in the case of cheating, is because of the

fact that in a case of cheating, the consent, which is given, is procured by deception, fraud and/or dishonestly. Section 90 IPC clearly lays down

that when consent is given by a person under fear or misconception of a fact, then, there is really no consent if the person, who obtains the consent,

knows or has reason to believe that the consent was given in consequence of such fear or misconception.

139. In the case at hand, except for the fact that in terms of the Scheme, in question, the free toner has not been provided to the complainant, there

is not even an iota of material, in the complaint and/or in the statement of the complainant, indicating, even remotely, that there was dishonest

intention, on the part of the accused, named in the complaint, from the very inception of the transaction; more so, when it is not the case of the

complainant that at the time, when he had purchased the Laser Printer, the Scheme, which he (complainant) had been informed of by the accused

No. 3, (i.e., the retailer of the accused No. 1), was not in force. Hence, even if the accused failed to keep their promise, it could not have exposed

them to prosecution, u/s 420 IPC, inasmuch as failure or omission, on the part of the accused, to supply free toner exposes them to civil

consequences and not to criminal prosecution.

140. What emerges from the above discussion is that the complaint had no ingredients of either Section 406 IPC or Section 420 IPC and the

dispute, if any, was, at best, a civil dispute and warranted civil action, if any, against the accused persons named in the complaint. The learned

Court below ought not to have, therefore, taken cognizance of offence either under Sections 420 or u/s 406 IPC nor could the learned Court

below have legally issued processes under any of the said penal provisions.

141. Situated thus, it becomes more than abundantly clear that the complaint case shall, if allowed to proceed, cause abuse of the process of Court

and lead to serious miscarriage of justice.

142. What emerges from the above discussion is that the allegations, made in the complaint, in question, do not make out any prima facie case of

commission of offence of either criminal breach of trust or of cheating. The taking of cognizance of offences, u/s 406 IPC and 420 IPC, is,

therefore, in the present case, wholly illegal. Consequently, the directions, given by the impugned order, dated 02.01.2007, can also not be

sustained.

143. In the result and for the reasons discussed above, the complaint, in question, as well as the impugned order, dated 02.01.2007, are hereby

set aside and quashed. With the above observations and directions, this criminal petition shall stand disposed of.