

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 21ST DAY OF JANUARY, 2021

BEFORE

THE HON'BLE MR. JUSTICE SURAJ GOVINDARAJ

CRIMINAL PETITION NO.5084 OF 2020

C/W

CRIMINAL PETITION NO.5092 OF 2020

CRIMINAL PETITION NO.3426 OF 2020

CRIMINAL PETITION NO.7780 OF 2020

IN CRL.P.NO.5084 OF 2020
BETWEEN:

SHANTANU RASTOGI
NON-EXECUTIVE DIRECTOR
(INVESTOR DIRECTOR)
NO BROKER TECHNOLOGIES
SOLUTIONS PVT. LTD.
RESIDING AT FLAT NO 2101-B
BUILDING 'B' OF BEAU MONDE
APPASAHEB MARATHE MARG
NEW PRABHADEVI, MUMBAI
MAHARASHTRA-400025

... PETITIONER

(BY SRI. D.P. SINGH, ADVOCATE FOR
SRI. NANDAKUMAR C.K, ADVOCATE)

AND:

1. STATE OF KARNATAKA
REPRESENTED BY
THE POLICE INSPECTOR
CID-CYBER CRIME POLICE
BENGALURU-560001

2. VIJAY ARISETTY

S/O ARISETTY SURYA RAO
VIVISH TECHNOLOGIES PVT. LTD.
NO.1262/1141, 1ST AND 2ND FLOOR
17TH CROSS SECTOR, 7 HSR LAYOUT
BENGALURU - 560102

... RESPONDENTS

(BY SRI. K. NAGESHWARAPPA, ADVOCATE FOR R1;
SRI. MOHAMMAD SHAKEEB, ADVOCATE FOR R2)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF CR.P.C, PRAYING TO QUASH THE IMPUGNED FIR NO.9/2020 DATED 19.06.2020 REGISTERED U/S 66(C) OF THE INFORMATION TECHNOLOGY ACT, 2008 AND SECTIONS 406,408,411 AND 420 OF IPC AT THE CYBER CRIME POLICE STATION, CID NO.1, CARLTON HOUSE, PALACE ROAD, BANGALORE-560001, (ANNEX-A), FILED PURSUANT TO THE COMPLAINT DATED 19.06.2020 FILED BY THE SECOND RESPONDENT (ANNEX-B) AND ALL PROCEEDINGS ARISING THEREFROM, AS AGAINST THE PETITIONER.

IN CRL.P.NO.5092 OF 2020
BETWEEN:

MAYANK KHANDUJA
NON-EXECUTIVE DIRECTOR
(INVESTOR DIRECTOR)
NOBROKER TECHNOLOGIES
SOLUTIONS PVT. LTD.,
RESIDING AT C/3/3183
VASANT KUNJ
NEW DELHI, INDIA-110070

... PETITIONER

(BY SRI. D.P. SINGH, ADVOCATE FOR
SRI. NANDAKUMAR C.K, ADVOCATE)

AND:

1. STATE OF KARNATAKA
REPRESENTED BY
THE POLICE INSPECTOR
CID-CYBER CRIME POLICE
BENGALURU-560001
2. VIJAY ARISETTY
S/O ARISETTY SURYA RAO
VIVISH TECHNOLOGIES PVT. LTD.
NO.1262/1141, 1ST AND 2ND FLOOR
17TH CROSS SECTOR, 7 HSR LAYOUT
BENGALURU - 560102 ... RESPONDENTS

(BY SRI. K. NAGESHWARAPPA, ADVOCATE FOR R1;
SRI. MOHAMMAD SHAKEEB, ADVOCATE FOR R2)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF CR.P.C, PRAYING TO QUASH THE IMPUGNED FIR NO.9/2020 DATED 19.06.2020 REGISTERED U/S 66(C) OF THE INFORMATION TECHNOLOGY ACT, 2008 AND SECTIONS 406,408,411 AND 420 OF IPC AT THE CYBER CRIME POLICE STATION, CID NO.1, CARLTON HOUSE, PALACE ROAD, BANGALORE-560001, (ANNEX-A), FILED PURSUANT TO THE COMPLAINT DATED 19.06.2020 FILED BY THE SECOND RESPONDENT (ANNEX-B) AND ALL PROCEEDINGS ARISING THEREFROM AND ALLOW THIS PETITION.

IN CRL.P.NO.3426 OF 2020
BETWEEN:

1. NOBROKER TECHNOLOGIES
SOLUTIONS PRIVATE LIMITED
OFFICE AT BREN MERCURY
NO. 835/39, KAIKONDRAHALLI
VARTHUR HOBLI, SARJAPUR MAIN ROAD
BANGALORE-560 035
REPRESENTED BY ITS DIRECTOR
MR. AKHIL GUPTA

2. AKHIL GUPTA
DIRECTOR NOBROKER TECHNOLOGIES
SOLUTIONS PRIVATE LIMITED
3. AMIT KUMAR
DIRECTOR NOBROKER
TECHNOLOGIES SOLUTIONS PVT. LTD.
4. PRAVEEN REDDY
ASSOCIATE NOBROKER TECHNOLOGIES
SOLUTIONS PVT. LTD.
5. NARENDRA MAKWANA
SENIOR ASSOCIATE - MANAGER
NOBROKER TECHNOLOGIES SOLUTIONS PVT. LTD.
6. SIDDHARTH MENON
SALES TRAINER, NOBROKER
TECHNOLOGIES SOLUTIONS PVT. LTD.

PETITIONS 2 TO 6 ALL ARE WORKING AT
OFFICE AT BREN MERCURY
NO. 835/39, KAIKONDRAHALLI
VARTHUR HOBLI, SARJAPUR MAIN ROAD
BANGALORE-560 035

... PETITIONERS

(BY SRI. UDAY HOLLAR, SR. COUNSEL FOR
SRI. HARISH B.N., ADVOCATE)

AND:

1. STATE OF KARNATAKA
REPRESENTED BY
THE POLICE INSPECTOR
CID-CYBER CRIME POLICE
BENGALURU-560001
2. VIJAY ARISETTY
S/O ARISETTY SURYA RAO
VIVISH TECHNOLOGIES PVT. LTD.
NO.1262/1141, 1ST AND 2ND FLOOR

17TH CROSS SECTOR, 7 HSR LAYOUT
BENGALURU – 560102

... RESPONDENTS

(BY SRI. K. NAGESHWARAPPA, ADVOCATE FOR R1;
SRI. MOHAMMAD SHAKEEB, ADVOCATE FOR R2)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF
CR.P.C, PRAYING TO QUASH THE ENTIRE PROCEEDINGS ARISING
FROM THE SAID FIR NO.9/2020 (CERTIFIED COPY OF THE
COMPLAINT AND FIR ARE PRODUCED AT ANNEXURE A AND
ANNEXURE B RESPECTIVELY)

IN CRL.P.NO.7780 OF 2020
BETWEEN:

1. VIJAY KUMAR ARISETTY
S/O LATE ARISETTY SURYA RAO
AGED 42 YEARS
2. SHREYANS DAGA
S/O SURENDRA KUMAR DAGA
AGED 40 YEARS
3. ABHISHEK KUMAR
S/O HARI PRASAD SHAH
AGED 43 YEARS

ALL ARE RESIDING AT
1262/1141, 1ST AND 2ND FLOOR
17TH CROSS, SECTOR 7, HSR LAYOUT
BANGALORE – 560102

... PETITIONERS

(BY SRI. MOHAMMAD SHAKEEB.M, ADVOCATE)

AND:

1. THE STATE OF KARNATAKA
THROUGH BELLANDURU POLICE STATION
BENGALURU CITY
DISTRICT – BENGALURU-560103

2. ASHISH SHAND
6TH FLOOR, BREN MERCURY
KAIKONDRAHALLI
SARJAPUR MAIN ROAD
BENGALURU-560035

... RESPONDENTS

(BY SRI. K. NAGESHWARAPPA, ADVOCATE FOR R1)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF CR.P.C, PRAYING TO QUASH THE FIR IN CR.NO.155/2020 DATED 28.06.2020 PENDING ON THE FILE OF I ADDL.C.M.M., BENGALURU REGISTERED BY THE RESPONDENT NO.1 FOR THE OFFENCE P/U/S 43 AND 66 OF INFORMATION TECHNOLOGY ACT AND SECTION 420 OF IPC (ANNEXURE-A)

THESE CRIMINAL PETITIONS COMING ON FOR ADMISSION AND HAVING BEEN RESERVED FOR ORDERS ON 18.12.2020, THIS DAY, **THROUGH VIDEO CONFERENCE**, THE COURT PRONOUNCE THE FOLLOWING:

ORDER

1. The petitioners in Cr.P No.3426/2020 are before this Court seeking for the following reliefs:

- 1.1. Call for the records of the FIR registered as Crime No.0009 of 2020 by the respondent No.1 - Criminal Investigation Department (Cyber Crime Division) Bengaluru;
- 1.2. Quash the entire proceedings arising from the said FIR in Crime No.0009 of 2020;
- 1.3. Pass any other order as this Hon'ble Court may deem fit, in the interest of justice.

2. The petitioners in Crl.P No.7780/2020 are before this Court seeking for the following reliefs:

2.1. That this Hon'ble Court be pleased to quash the FIR Crime No.0155/2020 dated 28th June 2020 pending on the file of the 1st Additional Chief Metropolitan Magistrate, Bangalore registered by the respondent No.1 for offences punishable under Sections 43 and 66 of the IT Act Section 420 of the IPC, in the interest of justice.

3. The background of 'No Broker':

3.1. The petitioner No.1, NoBroker Technologies Solutions Private Limited ('NoBroker') is stated to be a Private Limited Company engaged in the business of owning, managing and operating an online portal/website www.nobroker.in to facilitate owners, tenants, buyers and sellers to explore and identify all kinds of immovable properties including lands, buildings, factories, houses,

flats and other residential, commercial and industrial plots and properties to enable them to carry on transaction of purchase, sale, licensing, leasing, hiring, renting or otherwise relating to movable and immovable properties.

3.2. 'NoBroker' also provides certain ancillary services through its online portal to its customers such as facilitation of creation of rental agreement, facilitation of payment of rent and creation of rent receipts, assistance to tenants for finding suitable properties, negotiation and locality level expertise on payment of a subscription fee, etc.

3.3. In 2018, 'NoBroker' is stated to have introduced a new service called NoBrokerHood, a tech-enabled visitor and

community management system aimed to make life more convenient and secure for residents in any housing society. It is stated that 'NoBroker' provides a wide range of services, all of which have been developed by them through hard work and in a lawful manner, which data is entered into internal data base of 'NoBroker'. It is claimed that there are various distinguishing factors relating to the said software and/or website of 'NoBroker'.

4. Background of 'Mygate':

4.1. 'Mygate' is stated to be involved in software publishing and consultancy across various platforms. It is a company that, inter alia, provides security and community management for gated premises including

commercial and housing societies through an Application/Software that includes but is not limited to enabling many community features like Accounting/Invoicing maintenance payments, complaint management, amenities booking and gate management. 'Mygate' has, over the years, built a trustworthy and reputed brand name across India.

5. Dispute between 'NoBroker' and 'Mygate':

5.1. 'NoBroker' claims that 'Mygate' is engaged in similar services as that of 'NoBroker' and 'Mygate' has made use of distinguishing features of 'NoBroker' for the establishment of its own businesses.

5.2. 'Mygate' also claims similarly by contending that 'NoBroker' has used the distinguishing factors of 'Mygate' in its software.

5.3. From the background of both the companies, it is clear that both of them are in the same field of activity and carry out more or less similar businesses.

**6. Subject matter of Crl.P No.3426/2020:
(complaint by 'Mygate' against 'NoBroker')**

6.1. A complaint came to be filed by 'Mygate' against 'NoBroker' and its Directors/Officers on 19.06.2020 with CID, Cyber Crime Division, Bangalore alleging that 'Mygate's confidential information has been stolen by 'NoBroker' and its employees. 'NoBroker' has been misusing the information of 'Mygate' in

order to establish business relationship with the 'Mygate' existing customers as also defame 'Mygate'.

6.2. A detailed internal investigation was carried out by 'Mygate' leading to a conclusion that 'NoBroker' was stealing the data of 'Mygate'.

6.3. 'Mygate' set up traps in Bangalore by setting up a mock customer as also mock customer information. The said mock customer received a call from 'NoBroker'.

6.4. An employee of 'NoBroker' who sought to sell the 'NoBroker' package and/or services. This according to 'Mygate' establish that 'NoBroker' had access to the information of 'Mygate', which had not been shared with anybody else and this according to 'Mygate'

amounts to theft of information and data by 'NoBroker' of that available with 'Mygate'.

6.5. It is stated in the said complaint that similar mocks were conducted on several other occasions and locations. When the employees of 'NoBroker' had contacted the said mock customers. It is stated that during the said conversations of mock client/customers, the employees of 'NoBroker' had defamed 'Mygate', supplied false information relating to 'Mygate' services and product and on that background, action was sought to be taken as against 'NoBroker' and its employees.

6.6. In the said complaint, it is further alleged that the telephonic conversation have been recorded, which is available for the purpose

of investigation. Hence, a complaint came to be lodged against 'NoBroker' for offences punishable under Section 406, 408, 411 and 420 of IPC and Sections 66(C) of the Information Technology Act, 2000.

**7. Subject matter of Crl.P No.7780/2020:
(complaint by 'NoBroker' against 'Mygate')**

7.1. 'NoBroker' filed a complaint on 28.06.2020 against 'Mygate' and its employees complaining of various sharp and unethical practices of 'Mygate'. It is stated that 'NoBroker' had set up a mock society, mock crime as also mock customer and the mock customer received calls from 'Mygate' employees offering 'Mygate' services to such mock client. It is alleged that the details of the account created for the mock society was

not available in public domain yet 'Mygate' and its employees having access to the information and contacted the mock customer. In this background, it is alleged that there is theft of data of 'NoBroker' committed by 'Mygate'. To support and establish the above allegations, it is stated that there are various whatsapp messages, which are available, which could be provided to the Investigating Agency. It is further alleged that 'Mygate' had planted its employees or agents in the Corporate Office of 'NoBroker' with an intention of stealing 'NoBroker's confidential information and to misappropriate 'NoBroker' sensitive data and as such, action was sought to be taken against 'Mygate' and its employees for the offence punishable under Sections 420 of IPC

and Sections 66, 43 of the Information Technology Act, 2000.

8. CrI.P No.5084 of 2020 and CrI.P No.5092 of 2020

8.1. These Petitions have been filed by two Directors of NoBroker Technologies Solutions Private Limited seeking for quashing of the complaints-FIR in Crime No.9/2020 registered by CID Police, insofar as they are concerned.

8.2. Though separate petitions have been filed, the contents of the petitions are identical.

8.3. The only contention raised by these Directors is that they are Investee Directors inasmuch as they represent the investor in 'NoBroker', in that, the investor is a venture Capital

Company and only for the purpose of safeguarding the investment made by the investor - Venture Capital Company, the petitioners in Crl.P No. 5084/2020 and Crl.P No.5092/2020 have been nominated on the Board of 'NoBroker' and they have no role to play in the day to day functioning of 'NoBroker', they do not execute any executive functions but are only nominal Directors.

9. Sri.Udaya Holla, learned Senior Counsel instructed by Sri.Suhas, learned counsel appearing for petitioner in Crl.P No.3426/2020 submitted that

9.1. the complaint dated 19.06.2020 filed by 'Mygate' registered as Crime No.9/2020 by the CID is completely false one. There are notices which have been exchanged

between 'NoBroker' and 'Mygate'. There is no offence, which has been committed by 'NoBroker' or its employees and/or Directors. The dispute between the parties is civil in nature, a criminal twist is sought to be given to the civil dispute. As such, the said proceedings ought not to continue and is required to be dismissed.

9.2. However, as regards the petition in CrI.P No.7780/2020, Sri.Udaya Holla, learned Senior Counsel opposes the said petition contending that there is a theft of material, data base by 'Mygate' and as such, the investigation in criminal complaint ought to proceed against 'Mygate'.

10. Sri.Mohammed Shakeeb, learned counsel appearing for 'Mygate', the complainant in CrI.P No.3426/2020 would submit that

10.1. 'Mygate' has filed the complaint on the basis of credible information and documentary proof inasmuch as there are recordings of telephonic conversations which amounts to cheating as also various other offences under I.P.Act and therefore, he submits that these criminal actions cannot be termed to be civil dispute and investigation is required to be conducted.

10.2. In so far as the petitioners in CrI.P No.5084/2020 and CrI.P No.5092/2020 he submits that they are incharge of the day to day affairs of the company for the reason that they are in control of the

finances of the company, without the investment made by the Investor - venture capital company 'Nobroker' would not have the financial resources to spend for the offences to be committed. Without their concurrence and approval 'NoBroker' could not spend any amount. Hence, he submits that they have committed the offences and are required to be prosecuted.

10.3. As regards Crl.P No.7780/2020 where he appears for petitioner he contends that the said complaint filed on 28.06.2020 is as a counter blast to the complaint filed by 'Mygate' on 19.06.2020 as regards which he submits that all the allegations made in the said complaint dated 28.06.2020 registered as Crime No.155/2020 are false, there is no such offences alleged to have

been committed by 'Mygate' and/or its employees more so when even according to 'NoBroker' their software and technology is of such a nature it cannot be hacked into or stolen. In that view of the matter, he submits that the complaint in Crime No.155/2020 is required to be quashed.

11. Sri.D.P.Singh, learned counsel instructed by Sri.Raghuram Kadambi, learned counsel appearing for petitioners in Crl.P No.5084/2020 and Crl.P No.5092/2020 would submit that:

11.1. The petitioners are only investee Directors, they have no role to play in day to day functioning of 'NoBroker'.

11.2. In the complaint filed by 'Mygate', there are no particular allegations made against

these investee Directors, mere stating that they are incharge of the day to day affairs of the company is not sufficient to initiate proceedings against the investee directors.

He relies on the Master Circular No.1/2011 dated 29.07.2011 issued by Government of India, Ministry of Corporate Affairs, more particularly, Para 4 thereof, which is reproduced hereunder:

"4. It is noticed that penal actions are also initiated against certain Directors who are not charge with the responsibility, particularly in following cases:-

- a. For listed companies Securities and Exchange Board of India (SEBI) requires nomination of certain Directors designated as Independent Directors.*
- b. For public sector undertakings, respective Government nominates Directors on behalf of the respective Government.*
- c. Various public Sector Financial Institutions, Financial Institutions and Banks having participation in equity of a Company also nominate Directors to the Board of such companies.*

- d. *Directors nominated by the Government u/s 408 of the Companies Act, 1956.*

In super session of all earlier circulars, it is clarified that Registrar of Companies should take extra care in examining the cases where above Directors are also identified as Officer in default. No such Director as indicated above shall be held liable for any act of omission or commission by the company or by any officer of the company which constitute a breach or violation of any provision of the Companies Act, 1956, and which occurred without his knowledge attributable through Board process and without his consent or connivance or where he has acted diligently in the Board process. The Board process includes meeting of any committee of the Board and any information which the Director was authorized to receive as Director of the Board as per the decision of the Board. All the Regional Directors are advised to direct Inspecting Officers also to examine the Board's minutes of the company to arrive at a conclusion if Independent director is also responsible for any violation of the provisions of Companies Act, 1956".

- 11.3. He further relies on General Circular No.1 of 2020 issued by the Government of India, Ministry of Corporate Affairs, more particularly, Para 3 and 5 thereof, which is reproduced hereunder:

"3. Section 149(12) is a non obstante clause which provides that the liability of an independent director (ID) or a non-executive director (NED)

not being promoter or key managerial personnel would be only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently. In view of the express provisions of section 149(12), IDs, and NEDs (non-promoter and non-KMP), should not be arrayed in any criminal or civil proceedings under the Act, unless the above mentioned criteria is met. Typically, apart from IDs, non-promoter and non-KMP, NEDs, would exist in the following cases:

- a. Directors nominated by the Government on the public sector undertakings;*
- b. Directors nominated by Public Sector Financial Institutions, Financial Institutions or Banks having participation in equity of a company, or otherwise.*
- c. Directors appointed in pursuance to any statutory or regulatory requirement such as directors appointed by the NCLT.*

5. At the time of serving notices to the company, during inquiry, inspection, investigation, or adjudication proceedings, necessary documents may be sought so as to ascertain the involvement of the concerned officers of the company. In case, all care must be taken to ensure that civil or criminal proceedings are not unnecessarily initiated against the IDs or the NEDs, unless sufficient evidence exists to the contrary".

- 11.4. On the basis of the above, he submits that the petitioners being the nominee Directors

on account being appointed by the investor, no proceedings could be initiated against them.

11.5. He relies on the following decisions:

11.5.1. *Girdhari Lal Gupta v. D.H. Mehta, (1971) 3 SCC 189*

6. *What then does the expression "a person in-charge and responsible for the conduct of the affairs of a company" mean? It will be noticed that the word "company" includes a firm or other association, and the same test must apply to a director in-charge and a partner of a firm in-charge of a business. It seems to us that in the context a person "in-charge" must mean that the person should be in over-all control of the day to day business of the company or firm. This inference follows from the wording of Section 23-C(2). It mentions director, who may be a party to the policy being followed by a company and yet not be in-charge of the business of the company. Further it mentions manager, who usually is in charge of the business but not in over-all charge. Similarly the other officers may be in-charge of only some part of business.*

7. *In State v. S.P. Bhadani, Kanhaiya Singh, J., in construing a similar provision of the Employees Provident Fund Act (1952), Section 14-A —held that the first sub-section would be confined only to officers in the immediate charge of the management of the company. Later he observed that "it is, therefore, manifest that all the officers of the company not in direct charge of the management of the business are immune from the liability for the offence, unless they have*

contributed to its commission by consent, connivance or neglect”.

8. *In R.K. Khandelwal v. State D.S. Mathur, J., in construing Section 27 of the Drugs Act, 1940, a provision similar to the one we are concerned with, observed:*

“There can be directors who merely lay down the policy and are not concerned with the day to day working of the company. Consequently, the mere fact that the accused person is a partner or director of the Company, shall not make him criminally liable for the offence committed by the Company unless the other ingredients are established which make him criminally liable.”

9. *In Public Prosecutor v. R. Karuppian, Somasundaram, J., while dealing with a case arising under the Prevention of Food Adulteration Act, 1954 [(Section 17(1)] observed that the Secretary of the Cooperative Milk Society, on the facts of the case, could not be held to be a person in-charge of the Society. On the facts of that case the business of selling milk was done by the clerk of the Society and the secretary was only an honorary Secretary and was not coming to the Society daily*

11.5.2. National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal, (2010) 3 SCC 330

14. *A company may have a number of Directors and to make any or all the Directors as accused in a complaint merely on the basis of a statement that they are in charge of and responsible for the conduct of the business of the company without anything more is not a sufficient or adequate fulfilment of the requirements under Section 141.*

15. *In a catena of decisions, this Court has held that for making Directors liable for the offences committed by the company under Section 141 of the Act, there must be specific averments against the Directors, showing as to how and in what manner the Directors were responsible for the conduct of the business of the company.*

21. *While considering the above questions, this Court held as under: (S.M.S. Pharmaceuticals Ltd. (1) case, SCC pp. 102-03, paras 18-19)*

"18. To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That the respondent falls within the parameters of Section 141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141, he would issue the process. We have seen that merely being described as a Director in a company is not sufficient to satisfy the requirement of Section 141. Even a non-director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial.

19. In view of the above discussion, our answers to the questions posed in the reference are as under:

- (a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.
- (b) The answer to the question posed in sub-para (b) has to be in the negative. Merely being a Director of a company is not sufficient to make the person liable under Section 141 of the Act. A Director in a company cannot be deemed to be in charge of and responsible to the company for the conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.
- (c) The answer to Question (c) has to be in the affirmative. The question notes that the Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for the conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as Managing Director or Joint Managing Director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section

141. So far as the signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141."

22. *Therefore, this Court has distinguished the case of persons who are in charge of and responsible for the conduct of the business of the company at the time of the offence and the persons who are merely holding the post in a company and are not in charge of and responsible for the conduct of the business of the company. Further, in order to fasten the vicarious liability in accordance with Section 141, the averment as to the role of the Directors concerned should be specific. The description should be clear and there should be some unambiguous allegations as to how the Directors concerned were alleged to be in charge of and were responsible for the conduct and affairs of the company.*

36. *Section 291 of the Companies Act, 1956 provides that*

"291. General powers of Board.—(1) Subject to the provisions of [that] Act, the Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do:"

A company, though a legal entity, can act only through its Board of Directors. The settled position is that a Managing Director is prima facie in charge of and responsible for the company's business and affairs and can be prosecuted for offences by the company. But insofar as other Directors are concerned, they can be prosecuted only if they were in charge of and responsible for the conduct of the business of the company.

39. *From the above discussion, the following principles emerge:*

- (i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.*
- (ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.*
- (iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make the accused therein vicariously liable for offence committed by the company along with averments in the petition containing that the accused were in charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.*
- (iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.*
- (v) If the accused is a Managing Director or a Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.*
- (vi) If the accused is a Director or an officer of a company who signed the cheques on behalf of*

the company then also it is not necessary to make specific averment in the complaint.

(vii) The person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases.

11.5.3. Sunil Bharti Mittal v. CBI, (2015) 4 SCC 609

(ii) Principle of "alter ego", as applied

37. *The moot question is whether the aforesaid proposition, to proceed against the appellants is backed by law? In order to find the answer, let us scan through the case law that was cited during the arguments.*

38. *First case which needs to be discussed is Iridium India. Before we discuss the facts of this case, it would be relevant to point out that the question as to whether a company could be prosecuted for an offence which requires mens rea had been earlier referred to in a Constitution Bench of five Judges in Standard Chartered Bank v. Directorate of Enforcement. The Constitution Bench had held that a company can be prosecuted and convicted for an offence which requires a minimum sentence of imprisonment. In para 8 of the judgment, the Constitution Bench clarified that the Bench is not expressing any opinion on the question whether a corporation could be attributed with requisite mens rea to prove the guilt. Para 8 reads as under: (SCC p. 542)*

"8. ... It is only in a case requiring mens rea, a question arises whether a corporation could be attributed with requisite mens rea to prove the guilt. But as we are not concerned with this

question in these proceedings, we do not express any opinion on that issue."

39. *In Iridium India, the aforesaid question fell directly for consideration, namely, whether a company could be prosecuted for an offence which requires mens rea and discussed this aspect at length, taking note of the law that prevails in America and England on this issue. For our benefit, we will reproduce paras 59-64 herein: (SCC pp. 98-100)*

"59. The courts in England have emphatically rejected the notion that a body corporate could not commit a criminal offence which was an outcome of an act of will needing a particular state of mind. The aforesaid notion has been rejected by adopting the doctrine of attribution and imputation. In other words, the criminal intent of the 'alter ego' of the company/body corporate i.e. the person or group of persons that guide the business of the company, would be imputed to the corporation.

60. It may be appropriate at this stage to notice the observations made by MacNaghten, J. in Director of Public Prosecutions v. Kent and Sussex Contractors Ltd. (KB p. 156)

A body corporate is a "person" to whom, amongst the various attributes it may have, there should be imputed the attribute of a mind capable of knowing and forming an intention—indeed it is much too late in the day to suggest the contrary. It can only know or form an intention through its human agents, but circumstances may be such that the knowledge of the agent must be imputed to the body corporate. Counsel for the respondents says that, although a body corporate may be capable of having an intention, it is not capable of having a criminal intention. In this particular case the intention was the intention to deceive. If, as in

this case, the responsible agent of a body corporate puts forward a document knowing it to be false and intending that it should deceive, I apprehend, according to the authorities that Viscount Caldecote, L.C.J., has cited, his knowledge and intention must be imputed to the body corporate.

61. *The principle has been reiterated by Lord Denning in Bolton (H.L.)(Engg.) Co. Ltd. v. T.J. Graham & Sons Ltd. (QB p. 172)*

A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are Directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. That is made clear in Lord Haldane's speech in Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd. (AC at pp. 713 & 714). So also in the criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the Directors or the managers will render the company themselves guilty.

62. *The aforesaid principle has been firmly established in England since the decision of the House of Lords in Tesco Supermarkets Ltd. v. Nattrass. In stating the principle of corporate*

liability for criminal offences, Lord Reid made the following statement of law: (AC p. 170 E-G)

'I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, 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 that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability.'

63 From the above it becomes evident that a corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring mens rea. The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons. The position of law on this issue in Canada is almost the same. Mens rea is

attributed to corporations on the principle of 'alter ego' of the company.

64. So far as India is concerned, the legal position has been clearly stated by the Constitution Bench judgment of this Court in Standard Chartered Bank v. Directorate of Enforcement. On a detailed consideration of the entire body of case laws in this country as well as other jurisdictions, it has been observed as follows: (SCC p. 541, para 6)

'6. There is no dispute that a company is liable to be prosecuted and punished for criminal offences. Although there are earlier authorities to the effect that corporations cannot commit a crime, the generally accepted modern rule is that except for such crimes as a corporation is held incapable of committing by reason of the fact that they involve personal malicious intent, a corporation may be subject to indictment or other criminal process, although the criminal act is committed through its agents.'"

40. *It is abundantly clear from the above that the principle which is laid down is to the effect that the criminal intent of the "alter ego" of the company, that is the personal group of persons that guide the business of the company, would be imputed to the company/corporation. The legal proposition that is laid down in the aforesaid judgment in Iridium India case is that if the person or group of persons who control the affairs of the company commit an offence with a criminal intent, their criminality can be imputed to the company as well as they are "alter ego" of the company.*

41. *In the present case, however, this principle is applied in an exactly reverse scenario. Here, company is the accused person and the learned Special Magistrate has observed in the impugned order that since the appellants represent the directing mind and will of each company, their*

state of mind is the state of mind of the company and, therefore, on this premise, acts of the company are attributed and imputed to the appellants. It is difficult to accept it as the correct principle of law. As demonstrated hereinafter, this proposition would run contrary to the principle of vicarious liability detailing the circumstances under which a Director of a company can be held liable.

(iii) Circumstances when Director/person in charge of the affairs of the company can also be prosecuted, when the company is an accused person

42. *No doubt, a corporate entity is an artificial person which acts through its officers, Directors, Managing Director, Chairman, etc. If such a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. It would be more so, when the criminal act is that of conspiracy. However, at the same time, it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless the statute specifically provides so.*

43. *Thus, an individual who has perpetrated the commission of an offence on behalf of a company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Second situation in which he can be implicated is in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.*

44. *When the company is the offender, vicarious liability of the Directors cannot be imputed automatically, in the absence of any statutory provision to this effect. One such example is Section 141 of the Negotiable Instruments Act, 1881. In Aneeta Hada [Aneeta Hada v. Godfather*

Travels & Tours (P) Ltd., the Court noted that if a group of persons that guide the business of the company have the criminal intent, that would be imputed to the body corporate and it is in this backdrop, Section 141 of the Negotiable Instruments Act has to be understood. Such a position is, therefore, because of statutory intendment making it a deeming fiction. Here also, the principle of "alter ego", was applied only in one direction, namely, where a group of persons that guide the business had criminal intent, that is to be imputed to the body corporate and not the vice versa. Otherwise, there has to be a specific act attributed to the Director or any other person allegedly in control and management of the company, to the effect that such a person was responsible for the acts committed by or on behalf of the company.

45. *This very principle is elaborated in various other judgments. We have already taken note of Maharashtra State Electricity Distribution Co. Ltd. and S.K. Alagh. A few other judgments reiterating this principle are the following:*

45.1. *Jethsur Surangbhai v. State of Gujarat (SCC pp. 210-11, para 9)*

"9. ... With due respect what the High Court seems to have missed is that in a case like this where there was serious defalcation of the properties of the Sangh, unless the prosecution proved that there was a close cohesion and collusion between all the accused which formed the subject-matter of a conspiracy, it would be difficult to prove the dual charges particularly against the appellant (A-1). The charge of conspiracy having failed, the most material and integral part of the prosecution story against the appellant disappears. The only ground on the basis of which the High Court has convicted him is that as he was the Chairman of the Managing

Committee, he must be held to be vicariously liable for any order given or misappropriation committed by the other accused. The High Court, however, has not referred to the concept of vicarious liability but the findings of the High Court seem to indicate that this was the central idea in the mind of the High Court for convicting the appellant. In a criminal case of such a serious nature mens rea cannot be excluded and once the charge of conspiracy failed the onus lay on the prosecution to prove affirmatively that the appellant was directly and personally connected with acts or omissions pertaining to Items 2, 3 and 4. It is conceded by Mr Phadke that no such direct evidence is forthcoming and he tried to argue that as the appellant was Chairman of the Sangh and used to sign papers and approve various tenders, even as a matter of routine he should have acted with care and caution and his negligence would be a positive proof of his intention to commit the offence. We are however unable to agree with this somewhat broad statement of the law. In the absence of a charge of conspiracy the mere fact that the appellant happened to be the Chairman of the Committee would not make him criminally liable in a vicarious sense for Items 2 to 4. There is no evidence either direct or circumstantial to show that apart from approving the purchase of fertilisers he knew that the firms from which the fertilisers were purchased did not exist. Similar is the case with the other two items. Indeed, if the Chairman was to be made liable then all members of the Committee viz. Tahsildar and other nominated members, would be equally liable because all of them participated in the deliberations of the meetings of the Committee, a conclusion which has not even been suggested by the prosecution. As Chairman of the Sangh the appellant had to deal with a large variety of matters and it would not be humanly possible for him to analyse and go into the details of every small matter in order to find out whether there has been any criminal breach of trust. In fact, the hero

of the entire show seems to be A-3 who had so stage-managed the drama as to shield his guilt and bring the appellant in the forefront. But that by itself would not be conclusive evidence against the appellant. There is nothing to show that A-3 had either directly or indirectly informed the appellant regarding the illegal purchase of fertilisers or the missing of the five oil engines which came to light much later during the course of the audit. Far from proving the intention the prosecution has failed to prove that the appellant had any knowledge of defalcation of Items 2 to 4. In fact, so far as Item 3 is concerned, even Mr Phadke conceded that there is no direct evidence to connect the appellant."

(emphasis supplied)

45.2. *Sham Sunder v. State of Haryana* (SCC p. 632, para 9)

"9. But we are concerned with a criminal liability under penal provision and not a civil liability. The penal provision must be strictly construed in the first place. Secondly, there is no vicarious liability in criminal law unless the statute takes that also within its fold. Section 10 does not provide for such liability. It does not make all the partners liable for the offence whether they do business or not."

(emphasis supplied)

45.3. *Hira Lal Hari Lal Bhagwati v. CBI* (SCC p. 277, para 30)

"30. In our view, under the penal law, there is no concept of vicarious liability unless the said statute covers the same within its ambit. In the instant case, the said law which prevails in the field i.e. the Customs Act, 1962 the appellants have been thereinunder wholly discharged and the GCS granted immunity from prosecution."

(emphasis supplied)

45.4. *Maksud Saiyed v. State of Gujarat*
(SCC p. 674, para 13)

"13. Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. The Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the company. The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability."

(emphasis supplied)

45.5. *R. Kalyani v. Janak C. Mehta*
(SCC p. 527, para 32)

"32. Allegations contained in the FIR are for commission of offences under a general statute. A vicarious liability can be fastened only by reason of a provision of a statute and not otherwise. For the said purpose, a legal fiction has to be created. Even under a special statute when the vicarious criminal liability is fastened on a person on the premise that he was in charge of the affairs of the company and responsible to it, all the ingredients laid down under the statute must be fulfilled. A

legal fiction must be confined to the object and purport for which it has been created."

45.6. *Sharon Michael v. State of T.N. (SCC p. 383, para 16)*

"16. The first information report contains details of the terms of contract entered into by and between the parties as also the mode and manner in which they were implemented. Allegations have been made against the appellants in relation to execution of the contract. No case of criminal misconduct on their part has been made out before the formation of the contract. There is nothing to show that the appellants herein who hold different positions in the appellant Company made any representation in their personal capacities and, thus, they cannot be made vicariously liable only because they are employees of the Company."

(emphasis supplied)

45.7. *Keki Hormusji Gharda v. Mehervan Rustom Irani (SCC pp. 480-81, paras 16-19)*

"16. We have noticed hereinbefore that despite of the said road being under construction, the first respondent went to the police station thrice. He, therefore, was not obstructed from going to the police station. In fact, a firm action had been taken by the authorities. The workers were asked not to do any work on the road. We, therefore, fail to appreciate that how, in a situation of this nature, the Managing Director and the Directors of the Company as also the Architect can be said to have committed an offence under Section 341 IPC.

17. The Penal Code, 1860 save and except in some matters does not contemplate any vicarious liability on the part of a person. Commission of an offence by raising a legal fiction or by creating a vicarious liability in terms of the provisions of a

statute must be expressly stated. The Managing Director or the Directors of the Company, thus, cannot be said to have committed an offence only because they are holders of offices. The learned Additional Chief Metropolitan Magistrate, therefore, in our opinion, was not correct in issuing summons without taking into consideration this aspect of the matter. The Managing Director and the Directors of the Company should not have been summoned only because some allegations were made against the Company.

18. In Pepsi Foods Ltd. v. Judicial Magistrate this Court held as under: (SCC p. 760, para 28)

'28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.'

19. Even as regards the availability of the remedy of filing an application for discharge, the same would not mean that although the

allegations made in the complaint petition even if given face value and taken to be correct in its entirety, do not disclose an offence or it is found to be otherwise an abuse of the process of the court, still the High Court would refuse to exercise its discretionary jurisdiction under Section 482 of the Code of Criminal Procedure."

11.5.4. Standard Chartered Bank v. State of Maharashtra, (2016) 6 SCC 52

12. *At one point of time, an issue had arisen before this Court, whether a complaint could be held to be maintainable without making the company a party. The said controversy has been put to rest by a three-Judge Bench decision in Aneeta Hada v. Godfather Travels and Tours (P) Ltd. wherein it has been held that: (SCC p. 688, para 58)*

"58. ... when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof."

It has been further held therein that there cannot be any vicarious liability unless there is a prosecution against the company. In the case at hand, the Company has been arrayed as Accused 1 along with the Chairman and other Directors.

13. *Now, we must go back in time to appreciate what has been stated in S.M.S. Pharma I, wherein a three-Judge Bench answered a reference on three issues. The answers on two issues which are relevant for the present purpose are as follows: (SCC pp. 93-94, para 1)*

*"(a)****

(b) Whether a Director of a company would be deemed to be in charge of, and responsible to, the

company for conduct of the business of the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary?

(c) Even if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and or the Managing Directors or Joint Managing Director who admittedly would be in charge of the company and responsible to the company for conduct of its business could be proceeded against?"

14. *The three-Judge Bench in S.M.S. Pharma I case referred to Sections 138 and 141 of the Act, Sections 203 and 204 CrPC and observed (SCC p. 96, para 5) that a complaint must contain material to enable the Magistrate to make up his mind for issuing process and if this were not the requirement, consequences would be far-reaching. If a Magistrate has to issue process in every case, the burden of work before the Magistrate as well as the harassment caused to the respondents to whom process has to be issued would be tremendous. It has been observed therein that Section 204 CrPC commences with the words "if in the opinion of the Magistrate taking cognizance of an offence there is sufficient ground for proceeding" and that apart, the words "sufficient ground for proceeding" again suggest that ground should be made out in the complaint for proceeding against the respondent. The three-Judge Bench has ruled that it is settled law that at the time of issuing of the process, the Magistrate is required to see only the allegations in the complaint and where the allegations in the complaint or the charge-sheet do not constitute an offence against a person, the complaint is liable to be dismissed.*

15. *After so stating, the Court adverted to the complaint filed under Section 138 of the Act and opined that the complaint should make out a case for issue of process. As far as the officers*

responsible for conducting the affairs of the company are concerned, the Court referred to various provisions of the Companies Act, 1956 and analysed Section 141 of the Act to lay down as follows: (S.M.S. Pharma I case, SCC pp. 98-99, para 10)

"10. ... What is required is that the persons who are sought to be made criminally liable under Section 141 should be, at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for the conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a Director of a company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a company may be liable if he satisfies the main requirement of being in charge of and responsible for the conduct of business of a company at the relevant time. Liability depends on the role one plays in the affairs of a company and not on designation or status. If being a Director or Manager or Secretary was enough to cast criminal liability, the section would have said so. Instead of "every person" the section would have said "every Director, Manager or Secretary in a company is liable", etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons

who can be said to be connected with the commission of a crime at the relevant time have been subjected to action."

16. After so stating, the Court in *S.M.S. Pharma I* case placed reliance on sub-section (2) of Section 141 of the Act for getting support of the aforesaid reasoning as the said sub-section envisages direct involvement of any Director, Manager, Secretary or other officer of a company in the commission of an offence. The Court proceeded to observe that the said provision operates when in a trial it is proved that the offence has been committed with the consent or connivance or is attributable to neglect on the part of any of the holders of the offices in a company. It has also been observed that provision has been made for Directors, Managers, Secretaries and other officers of a company to cover them in cases of their proved involvement. It is because a person who is in charge of and responsible for conduct of business of a company would naturally know why a cheque in question was issued and why it got dishonoured and simultaneously it means no other person connected with a company is made liable under Section 141 of the Act. The liability arises, as the three-Judge Bench opined, on account of conduct, act or omission on the part of an officer and not merely on account of holding office or position in a company and, therefore, in order to bring a case within Section 141 of the Act, the complaint must disclose the necessary facts which makes a person liable.

17. In the said case, the Court has referred to the decisions in *Secunderabad Health Care Ltd., V. Sudheer Reddy v. State of A.P., R. Kannan v. Kotak Mahindra Finance Ltd., Lok Housing and Constructions Ltd. v. Raghupati Leasing and Finance Ltd., Sunil Kumar Chhaparia v. Dakka Eshwaraiah, State of Haryana v. Brij Lal Mittal, K.P.G. Nair v. Jindal Menthol India Ltd., Katta Sujatha v. Fertilizers & Chemicals Travancore Ltd.*

and eventually expressed thus: (S.M.S. Pharma I case, SCC pp. 102-03, para 18)

"18. ... A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That the respondent falls within the parameters of Section 141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141, he would issue the process. We have seen that merely being described as a Director in a company is not sufficient to satisfy the requirement of Section 141. Even a non-Director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial."

18. *On the basis of the aforesaid analysis, the Court in this regard concluded that (S.M.S. Pharma I case, SCC p. 103, para 19)*

"19. (a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied."

19. After the three-Judge Bench in *S.M.S. Pharma I* case answered the reference, the matter was placed before a two-Judge Bench. The two-Judge Bench, hearing *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla* (hereinafter referred to as "*S.M.S. Pharma II*"), reproduced a passage from *Sabitha Ramamurthy v. R.B.S. Channabasavaradhya* [*Sabitha Ramamurthy v. R.B.S. Channabasavaradhya*, which reads as follows: (*S.M.S. Pharma II* case, SCC pp. 79-80, para 24)

"24. ... '7. A bare perusal of the complaint petitions demonstrates that the statutory requirements contained in Section 141 of the Negotiable Instruments Act had not been complied with. It may be true that it is not necessary for the complainant to specifically reproduce the wordings of the section but what is required is a clear statement of fact so as to enable the court to arrive at a prima facie opinion that the accused are vicariously liable. Section 141 raises a legal fiction. By reason of the said provision, a person although is not personally liable for commission of such an offence would be vicariously liable therefor. Such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned only if the requisite statements, which are required to be averred in the complaint petition, are made so as to make the accused therein vicariously liable for the offence committed by the company. Before a person can be made vicariously liable, strict compliance with the statutory requirements would be insisted.' (*Sabitha Ramamurthy* case, SCC pp. 585-86, para 7)"

20. Thereafter the Court referred to the authority in *Saroj Kumar Poddar v. State (NCT of Delhi)* and noted the observations which we think it apt to reproduce: (*S.M.S. Pharma II* case, SCC p. 80, para 25)

"25. ... '14. Apart from the Company and the appellant, as noticed hereinbefore, the Managing Director and all other Directors were also made accused. The appellant did not issue any cheque. He, as noticed hereinbefore, had resigned from the directorship of the Company. It may be true that as to exactly on what date the said resignation was accepted by the Company is not known, but, even otherwise, there is no averment in the complaint petitions as to how and in what manner the appellant was responsible for the conduct of the business of the Company or otherwise responsible to it in regard to its functioning. He had not issued any cheque. How he is responsible for dishonour of the cheque has not been stated. The allegations made in para 3, thus, in our opinion do not satisfy the requirements of Section 141 of the Act.' (Saroj Kumar Poddar case, SCC p. 697, para 14)"

21. The said observations were clarified by stating that: (S.M.S. Pharma II case, SCC p. 80, para 26)

"26. A faint suggestion was made that this Court in Saroj Kumar Poddar has laid down the law that the complaint petition not only must contain averments satisfying the requirements of Section 141 of the Act but must also show as to how and in what manner the appellant was responsible for the conduct of the business of the company or otherwise responsible to it in regard to its functioning. A plain reading of the said judgment would show that no such general law was laid down therein. The observations were made in the context of the said case as it was dealing with a contention that although no direct averment was made as against the appellant of the said case fulfilling the requirements of Section 141 of the Act but there were other averments which would show that the appellant therein was liable therefor."

22. The said clarification was reiterated in Everest Advertising (P) Ltd. v. State (Govt. of NCT of

Delhi). In the said case, taking note of the assertions in the complaint which were really vague, the Court declined to interfere with the order passed by the High Court which had opined that the complaint did not disclose commission of offence against the accused persons.

23. *Be it noted, the observations made in Saroj Kumar Poddar [Saroj Kumar Poddar v. State (NCT of Delhi), and clarification given in S.M.S. Pharma II and Everest Advertising (P) Ltd. [Everest Advertising (P) Ltd. v. State (Govt. of NCT of Delhi), were taken note of in K.K. Ahuja v. V.K. Vora. In the said case, the Court explaining the position under Section 141 of the Act has stated thus: (K.K. Ahuja case, SCC pp. 61-62, para 27)*

"27. The position under Section 141 of the Act can be summarised thus:

(i) If the accused is the Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. It is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix "Managing" to the word "Director" makes it clear that they were in charge of and are responsible to the company, for the conduct of the business of the company.

(ii) In the case of a Director or an officer of the company who signed the cheque on behalf of the company, there is no need to make a specific averment that he was in charge of and was responsible to the company, for the conduct of the business of the company or make any specific allegation about consent, connivance or negligence. The very fact that the dishonoured cheque was signed by him on behalf of the

company, would give rise to responsibility under sub-section (2) of Section 141.

(iii) In the case of a Director, Secretary or Manager [as defined in Section 2(24) of the Companies Act] or a person referred to in clauses (e) and (f) of Section 5 of the Companies Act, an averment in the complaint that he was in charge of, and was responsible to the company, for the conduct of the business of the company is necessary to bring the case under Section 141(1) of the Act. No further averment would be necessary in the complaint, though some particulars will be desirable. They can also be made liable under Section 141(2) by making necessary averments relating to consent and connivance or negligence, in the complaint, to bring the matter under that sub-section.

(iv) Other officers of a company cannot be made liable under sub-section (1) of Section 141. Other officers of a company can be made liable only under sub-section (2) of Section 141, by averring in the complaint their position and duties in the company and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence."

11.5.5. Chintalapati Srinivasa Raju v. SEBI, (2018) 7 SCC 443

22. *The minority judgment then went on to notice the distinction between an executive and a non-Executive Director.*

23. *In Pooja Ravinder Devidasani v. State of Maharashtra, it is stated: (SCC pp. 9-10, para 17)*

"17. There is no dispute that the appellant, who was wife of the Managing Director, was appointed

as a Director of the Company— M/s Elite International (P) Ltd. on 1-7-2004 and had also executed a letter of guarantee on 19-1-2005. The cheques in question were issued during April 2008 to September 2008. So far as the dishonour of cheques is concerned, admittedly the cheques were not signed by the appellant. There is also no dispute that the appellant was not the Managing Director but only a non-Executive Director of the Company. Non-Executive Director is no doubt a custodian of the governance of the company but is not involved in the day-to-day affairs of the running of its business and only monitors the executive activity. To fasten vicarious liability under Section 141 of the Act on a person, at the material time that person shall have been at the helm of affairs of the company, one who actively looks after the day-to-day activities of the company and is particularly responsible for the conduct of its business. Simply because a person is a Director of a company, does not make him liable under the NI Act. Every person connected with the Company will not fall into the ambit of the provision. Time and again, it has been asserted by this Court that only those persons who were in charge of and responsible for the conduct of the business of the Company at the time of commission of an offence will be liable for criminal action. A Director, who was not in charge of and was not responsible for the conduct of the business of the Company at the relevant time, will not be liable for an offence under Section 141 of the NI Act. In National Small Industries Corpn. [National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal, this Court observed: (SCC p. 336, paras 13-14)

'13. Section 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the

company for the conduct of the business of the company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent 1 was in charge of or was responsible to the accused Company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability.

14. A company may have a number of Directors and to make any or all the Directors as accused in a complaint merely on the basis of a statement that they are in charge of and responsible for the conduct of the business of the company without anything more is not a sufficient or adequate fulfilment of the requirements under Section 141."

Non-Executive Directors are, therefore, persons who are not involved in the day-to-day affairs of the running of the company and are not in charge of and not responsible for the conduct of the business of the company.

24. *An instructive judgment of Lord Halsbury is contained in Dovey and the Metropolitan Bank (of England and Wales) Ltd. v. John Cory. The Lord Chancellor put it thus: (AC pp. 485-86)*

"The charge of neglect appears to rest on the assertion that Mr Cory, like the other Directors, did not attend to any details of business not brought before them by the general manager or the chairman, and the argument raises a serious question as to the responsibility of all persons holding positions like that of Directors, how far they are called upon to distrust and be on their guard against the possibility of fraud being committed by their subordinates of every degree. It is obvious if there is such a duty it must render anything like an intelligent devolution of labour impossible. Was Mr Cory to turn himself into an auditor, a managing Director, a chairman, and find

out whether auditors, managing Directors, and chairmen were all alike deceiving him? That the letters of the auditors were kept from him is clear. That he was assured that provision had been made for bad debts, and that he believed such assurances, is involved in the admission that he was guilty of no moral fraud; so that it comes to this, that he ought to have discovered a network of conspiracy and fraud by which he was surrounded, and found out that his own brother and the managing Director (who have since been made criminally responsible for frauds connected with their respective offices) were inducing him to make representations as to the prospects of the concern and the dividends properly payable which have turned out to be improper and false. I cannot think that it can be expected of a Director that he should be watching either the inferior officers of the bank or verifying the calculations of the auditors himself. The business of life could not go on if people could not trust those who are put into a position of trust for the express purpose of attending to details of management. If Mr Cory was deceived by his own officers — and the theory of his being free from moral fraud assumes under the circumstances that he was — there appears to me to be no case against him at all. The provision made for bad debts, it is well said, was inadequate; but those who assured him that it was adequate were the very persons who were to attend to that part of the business; and so of the rest. If the state and condition of the bank were what was represented, then no one will say that the sum paid in dividends was excessive."

Per Lord Davey, it was held: (AC pp. 492-93)

"In this state of the evidence, my Lords, I ask whether the course of business at the board meetings, as described by the respondent, was a reasonable course to be pursued by the respondent and other Directors, or whether the knowledge which might have been derived from a

careful and comparative examination of the weekly states and quarterly returns from the different branches of the bank ought to be imputed to the respondent, or (alternatively) whether he was guilty of such neglect of his duty as a Director as would render him liable to damages. I do not think that it is made out that either of the two latter questions should be answered in the affirmative. I think the respondent was bound to give his attention to and exercise his judgment as a man of business on the matters which were brought before the board at the meetings which he attended, and it is not proved that he did not do so. But I think he was entitled to rely upon the judgment, information, and advice of the chairman and general manager, as to whose integrity, skill, and competence he had no reason for suspicion. I agree with what was said by Sir George Jessel in Hallmark case [Wincham Shipbuilding, Boiler and Salt Company, In re, (1878) LR 9 Ch D 329 (CA)] , and by Chitty, J. in Denham and Company, In re, that Directors are not bound to examine entries in the company's books. It was the duty of the general manager and (possibly) of the chairman to go carefully through the returns from the branches, and to bring before the board any matter requiring their consideration; but the respondent was not, in my opinion, guilty of negligence in not examining them for himself, notwithstanding that they were laid on the table of the board for reference. The case is no doubt one of some difficulty, but the appellant has not made out to my satisfaction that the respondent wilfully (as that term is explained in the cases I have referred to) misappropriated the company's funds in payment of dividends."

**11.5.6. Bhardwaj Thiruvenkata
Venkatavraghavan vs. Ashok Arora,
2017 SCC OnLine Del 7416**

8. *The legality and validity of Master circular dated 2nd July, 2012 was challenged before a Division*

Bench of the Gujarat High Court in Ionic Metalliks v. Union of India, 2014 SCC OnLine Guj 10065; (2015) 2 GLH 156. The court while deciding the issue noted the categories of Directors under the Companies Act and the Listing Agreement prescribed by Securities and Exchange Board of India (in short SEBI) as:

"A. Classification under the Companies Act

Categories of Directors

The Companies Act refers to the following two specific categories of Directors:

- 1. Managing Directors; and*
- 2. Whole-time Directors.*

A Managing Director is a Director who has substantial powers of management of the affairs of the company subject to the superintendence, control and direction of the Board in question. A Whole-time Director includes a Director who is in the whole-time employment of the company, devotes his whole-time of working hours to the company in question and has a significant personal interest in the company as his source of income.

Every public company and private company, which is a subsidiary of a public company, having a share capital of more than Five Crore rupees (Rs. 5,00,00,000/-) must have a Managing or Whole-time Director or a Manager.

Further classification of Directors

Based on the circumstances surrounding their appointment, the Companies Act recognizes the following further types of Directors:

- 1. First Directors: Subject to any regulations in the Articles of a company, the subscribers to the Memorandum of Association, or the company's charter or constitution ("Memorandum"), shall*

be deemed to be the Directors of the company, until such time when Directors are duly appointed in the annual general meeting ("AGM").

- 2. Casual vacancies: Where a Director appointed at the AGM vacates office before his or her term of office expires in the normal course, the resulting vacancy may, subject to the Articles, be filled by the Board. Such person so appointed shall hold office up to the time which the Director who vacated office would have held office if he or she had not so vacated such office.*
- 3. Additional Directors: If the Articles specifically so provide or enable, the Board has the discretion, where it feels it necessary and expedient, to appoint Additional Directors who will hold office until the next AGM. However, the number of Directors and Additional Directors together shall not exceed the maximum strength fixed in the Articles for the Board.*
- 4. Alternate Director: If so authorized by the Articles or by a resolution passed by the company in general meeting, the Board may appoint an Alternate Director to act for a Director ("Original Director"), who is absent for whatever reason for a minimum period of three months from the State in which the meetings of the Board are ordinarily held. Such Alternate Director will hold office until such period that the Original Director would have held his or her office. However, any provision for automatic re-appointment of retiring Directors applies to the Original Director and not to the Alternate Director.*
- 5. 'Shadow' Director: A person, who is not appointed to the Board, but on whose directions the Board is accustomed to act, is liable as a Director of the company, unless he or she is*

giving advice in his or her professional capacity. Thus, such a 'shadow' Director may be treated as an 'officer in default' under the Companies Act.

- 6. De facto Director: Where a person who is not actually appointed as a Director, but acts as a Director and is held out by the company as such, such person is considered as a de facto Director. Unlike a 'shadow' Director, a de facto Director purports to act, and is seen to the outside world as acting, as a Director of the company. Such a de facto Director is liable as a Director under the Companies Act.*
- 7. Rotational Directors: At least two-thirds of the Directors of a public company or of a private company subsidiary of a public company have to retire by rotation and the term "rotational Director" refers to such Directors who have to retire (and may, subject to the Articles, be eligible for re-appointment) at the end of his or her tenure.*
- 8. Nominee Directors: They can be appointed by certain shareholders, third parties through contracts, lending public financial institutions or banks, or by the Central Government in case of oppression or mismanagement. The extent of a nominee Director's rights and the scope of supervision by the shareholders, is contained in the contract that enables such appointments, or (as appropriate) the relevant statutes applicable to such public financial institution or bank. However, nominee Directors must be particularly careful not to act only in the interests of their nominators, but must act in the best interests of the company and its shareholders as a whole. The fixing of liabilities on nominee Directors in India does not turn on the circumstances of their appointment or, indeed, who nominated them as Directors. Chapter 4 and Chapter 5 that follow set out*

certain duties and liabilities that apply to, or can be affixed on, Directors in general. Whether nominee Directors are required by law to discharge such duties or bear such liabilities will depend on the application of the legal provisions in question, the fiduciary duties involved and whether such nominee Director is to be regarded as being in control or in charge of the company and its activities. This determination ultimately turns on the specific facts and circumstances involved in each case.

B. Classification under the Listing Agreement

The Securities Contracts (Regulation) Act, 1956, read with the rules and regulations made thereunder, requires every company desirous of listing its shares on a recognized Indian stock exchange, to execute a listing agreement ("Agreement") with such Indian stock exchange. This Agreement is in a standard format (prescribed by the Securities Exchange Board of India ("SEBI")), as amended by SEBI from time to time. The Agreement provides for the following further categories of Directors:

Categories under Listing Agreement

- 1. Executive Director;*
- 2. Non-executive Director; and*
- 3. Independent Director.*

Executive and non-executive Directors

An Executive Director can be either a Whole-time Director of the company (i.e, one who devotes his whole time of working hours to the company and has a significant personal interest in the company as his source of income), or a Managing Director (i.e, one who is employed by the company as such and has substantial powers of management over the affairs of the company subject to the superintendence, direction and control of the Board). In contrast, a non-executive

Director is a Director who is neither a Whole-time Director nor a Managing Director. Clause 49 of the Agreement prescribes that the Board shall have an optimum combination of executive and non-executive Directors, with not less than fifty percent (50%) of the Board comprising non-executive Directors. Where the Chairman of the Board is a non-executive Director, at least one-third of the Board should comprise independent Directors and in case he is an executive Director, at least half of the Board should comprise independent Directors. Where the non-executive Chairman is a promoter of the company or is related to any promoter or person occupying management positions at the Board level or at one level below the Board, at least one-half of the Board of the company shall consist of independent Directors.

Independent Directors

The Agreement defines an "Independent Director" as a non-executive Director of the company who:

- a. apart from receiving Director's remuneration, does not have material pecuniary relationships or transactions with the company, its promoters, its Directors, its senior management, or its holding company, its subsidiaries, and associates which may affect independence of the Director;*
- b. is not related to promoters or persons occupying management positions at the board level or at one level below the board;*
- c. has not been an executive of the company in the immediately preceding three (3) financial years;*
- d. is not a partner or an executive or was not a partner or an executive during the preceding three (3) years, of any of the following:*

- i. the statutory audit firm or the internal audit firm that is associated with the company, and*
- ii. the legal firms and consulting firms that have a material association with the company;*
- e. is not a material supplier, service provider or customer or a lessor or lessee of the company, which may affect the independence of the Director; or*
- f. he is not a substantial shareholder of the company, i.e, owning two percent (2%) or more of the block of voting shares; and*
- g. he is not less than twenty-one (21) years of age.*

Nominee directors appointed by an institution that has invested in, or lent money to, the company are also treated as independent Directors."

9. *The Companies Act, 2013 recognizes different categories of directors and creates a distinction in the status of independent and nominee directors. Section 2(47) defines an independent director as one referred to in sub section 6 of section 149.*

10. *Section 149 sub-section 6 of the Companies Act 2013 prescribes the qualification of an independent director as under:*

*"149. Company to Have Board of Directors
(1)*

(6) An independent director in relation to a company, means a director other than a managing director or a whole-time director or a nominee director,—

(a) *who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience;*

(b) (i) *who is or was not a promoter of the company or its holding, subsidiary or associate company;*

(ii) *who is not related to promoters or directors in the company, its holding, subsidiary or associate company."*

11. *A Nominee Director has been defined under the Explanation to subsection (7) of Section 149 as:*

"Explanation: For the purposes of this section, "nominee director" means a director nominated by any financial institution in pursuance of the provisions of any law for the time being in force or of any agreement, or appointed by any Government, or any other person to represent its interests."

12. *Further sub section 12 to Section 149 provides:*

"Notwithstanding anything contained in this Act,—

(i) an independent director;

(ii) a non-executive director not being promoter or key managerial personnel, shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently."

13. *As has been noted above, the Petitioner was appointed as an independent non executive nominee director in 2009 and he subsequently*

resigned from the company in the year 2015. In terms of Section 149(12) of the Companies Act, 2013 he shall be held liable, only in respect of such acts of omission or commission by the company which had occurred with his knowledge or consent or connivance or where he had not acted diligently attributable through Board processes. Thus specific averments are required to be made in the complaint to show that the offence was committed with the knowledge/consent/connivance of the Petitioner.

14. *Merely because the petitioner is the Director of Sequoia India Investment Holding which finances Vasan Health Care and by virtue thereof is a nominee independent director of Vasan Health Care, he cannot be held to be responsible for the day-to-day affairs of Vasan Health Care. Even otherwise the contentions now raised during the course of arguments and in the reply affidavits are not part of the complaints. In the complaints it is merely stated that accused No. 2 to 8 are the directors of the company and have been actively participating in day-to-day affairs of the company and take all the decisions for the company. Admittedly, the petitioner is not the Managing Director of Vasan Health Care nor the signatory to the cheque. He is also not the person responsible for day-to-day functioning of Vasan Health Care. No vicarious liability can be fastened on the petitioner in the absence of specific role being attributed to the petitioner.*

11.5.7. N. Magesh v. State of Tamil Nadu & Ors., MANU/TN/5075/2019

14. *It is important to note that the Final Report has been filed for IPC offences against the accused persons. The Penal Code does not contemplate any vicarious liability on a party, who is not charged directly for the commission of an offence. The concept of vicarious liability is created by legal*

fiction only where it is specifically provided under a statute. Useful reference can be made in this regard, to the Judgment of the Hon'ble Supreme Court in Sunil Bharti Mittal .Vs. Central Bureau of Investigation reported in (2015) 1 MLJ (Crl) 231 (SC). The relevant portions of the judgment is extracted hereunder:

18.*The neat submission of Mr. Salve was that the aforesaid reason given by the learned Special Judge was clearly erroneous in law. Expanding this argument, he submitted that principle of "alter ego" has always been applied in reverse, inasmuch as general principle is that the acts of individual, who is in control of the affairs of a company and is a directing mind, are attributed to the company, inasmuch as whenever such a person, who is controlling the affairs of the company, is made an accused, on the application of the principle of "alter ego", the company can also be implicated as accused person. It is on the well recognised principle that company does not act of its own but through its Directors/Officers and when such Directors/Officers act on behalf of the company, the company is also held liable for those acts on the application of "principal - agent" principle. He submitted that it has never been a case where for the act of the company, an individual is made accused, unless there is a categorical provision in the statute making such a person vicariously liable or there is enough material to attribute the alleged acts of criminality to the said person. For his aforesaid submissions, he placed heavy reliance upon the decision of this Court in Iridium India Telecom Ltd. v. Motorola Inc[2]. He further submitted that merely on the basis of the appellant's status in the company, it could not be presumed that it is the appellant who became a party to the alleged conspiracy, as was held in Maharashtra State Electricity Distribution Co. Ltd. v. Datar Switchgear Ltd.[3] in the following manner:*

"27. A bare perusal of the complaint shows that the gravamen of the allegation is that a fabricated document containing the offending endorsement was tendered in evidence before the Arbitral Tribunal on behalf of MSEB by Accused 6, who was in charge of Shirpur Section. It is evident from the a for extracted paragraphs of the complaint that other accused have been named in the complaint because, according to the complainant, MSEB, Accused 1 was acting under their control and management. It bears repetition that the only averment made against Appellant 2 is that Appellant 1 i.e. MSEB was acting under the control and management of Appellant 2 along with other three accused. There is no denying the fact that Appellant 2 happened to be the Chairman of MSEB at the relevant time but it is a settled proposition of law that one cannot draw a presumption that a Chairman of a company is responsible for all acts committed by or on behalf of the company. In the entire body of the complaint there is no allegation that Appellant 2 had personally participated in the arbitration proceedings or was monitoring them in his capacity as the Chairman of MSEB and it was at his instance that the subject interpolation was made in Ext. C-64.

XX XX XX

In this regard, it would be useful to advert to the observations made by a three-Judge Bench of this Court in S.M.S. Pharmaceuticals (2005)8 SCC 89: (SCC p. 98, para 8)

"8. ... There is no universal rule that a Director of a company is in charge of its everyday affairs. We have discussed about the position of a Director in a company in order to illustrate the point that there is no [pic]magic as such in a particular word, be it Director, manager or secretary. It all depends upon the respective roles assigned to the officers

in a company. A company may have managers or secretaries for different departments, which means, it may have more than one manager or secretary."

Mr. Salve also referred to the following observations in S.K. Alagh v. State of U.P. Air 2008 SC 1731 : (2008) 5 SCC 662 : LNIND 2008 SC 368: (2008) 1 MLJ (Cri) 1360

"12. The short question which arises for consideration is as to whether the complaint petition, even if given face value and taken to be correct in its entirety, disclosed an offence as against the appellant under Section 406 of the Penal Code.

xx xx xx

19. *As, admittedly, drafts were drawn in the name of the Company, even if the appellant was its Managing Director, he cannot be said to have committed an offence under Section 406 of the Penal Code. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor. In absence of any provision laid down under the statute, a Director of a Company or an employee cannot be held to be vicariously liable for any offence committed by the Company itself. (See Sabitha Ramamurthy v. R.B.S. Channabasavaradhya, (2006) 10 SCC 581."*

Reliance was also placed on the decision in the case of Aneeta Hada v. Godfather Travels & Tours (P) Ltd. AIR 2012 SC 2795: (2012) 5 SCC 661: LNIND 2012 SC 260, with particular emphasis on the following passage:

"32. We have referred to the aforesaid authorities to highlight that the company can have criminal liability and further, if a group of persons that guide the business of the companies have the

criminal intent, that would be imputed to the body corporate. In this Section 141 of the Act has to be understood. The said provision clearly stipulates that when a person which is a company commits an offence, then certain categories of persons in charge as well as the company would be deemed to be liable for the offences under Section 138. Thus, the statutory intendment is absolutely plain. As is perceptible, the provision makes the functionaries and the companies to be liable and that is by deeming fiction. A deeming fiction has its own signification."

32. *The moot question is whether the aforesaid proposition, to proceed against the appellants is backed by law? In order to find the answer, let us scan through the case law that was cited during the arguments.*

33. *First case which needs to be discussed is Iridium India (supra). Before we discuss the facts of this case, it would be relevant to point out that the question as to whether a company could be prosecuted for an offence which requires mens rea had been earlier referred to in a Constitution Bench of five Judges in the case of Standard Chartered Bank v. Directorate of Enforcement[11]. The Constitution Bench had held that a company can be prosecuted and convicted for an offence which requires a minimum sentence of imprisonment. In para 8 of the judgment, the Constitution Bench clarified that the Bench is not expressing any opinion on the question whether a corporation could be attributed with requisite mens rea to prove the guilt. Para 8 reads as under:*

"8. It is only in a case requiring mens rea, a question arises whether a corporation could be attributed with requisite mens rea to prove the guilt. But as we are not concerned with this question in these proceedings, we do not express any opinion on that issue."

34.*In Iridium India (supra), the aforesaid question fell directly for consideration, namely, whether a company could be prosecuted for an offence which requires mens rea and discussed this aspect at length, taking note of the law that prevails in America and England on this issue. For our benefit, we will reproduce paras 59, 60, 61, 62, 63 and 64 herein:*

"59. The courts in England have emphatically rejected the notion that a body corporate could not commit a criminal offence which was an outcome of an act of will needing a particular state of mind. The aforesaid notion has been rejected by adopting the doctrine of attribution and imputation. In other words, the criminal intent of the "alter ego" of the company/body corporate i.e. the person or group of persons that guide the business of the company, would be imputed to the corporation.

60.*It may be appropriate at this stage to notice the observations made by MacNaghten, J. in Director of Public Prosecutions v. Kent and Sussex Contractors Ltd. 1972 AC 153: (AC p. 156):*

"A body corporate is a "person" to whom, amongst the various attributes it may have, there should be imputed the attribute of a mind capable of knowing and forming an intention - indeed it is much too late in the day to suggest the contrary. It can only know or form an intention through its human agents, but circumstances may be such that the knowledge of the agent must be imputed to the body corporate. Counsel for the respondents says that, although a body corporate may be capable of having an intention, it is not capable of having a criminal intention. In this particular case the intention was the intention to deceive. If, as in this case, the responsible agent of a body corporate puts forward a document knowing it to be false and intending that it should [pic] deceive,

I apprehend, according to the authorities that Viscount Caldecote, L.C.J., has cited, his knowledge and intention must be imputed to the body corporate."

61. *The principle has been reiterated by Lord Denning in Bolton (H.L.) (Engg.) Co. Ltd. v. T.J. Graham & Sons Ltd. in the following words: (AC p.172):*

"A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. That is made clear in Lord Haldane's speech in Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd. (AC at pp. 713, 714). So also in the criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or the managers will render the company themselves guilty."

62. *The aforesaid principle has been firmly established in England since the decision of the House of Lords in Tesco Supermarkets Ltd. v. Nattrass. In stating the principle of corporate liability for criminal offences, Lord Reid made the following statement of law: (AC p. 170 E-G)*

"I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, 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 that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability."

63. *From the above it becomes evident that a corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring mens rea. The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons. The position of law on this issue in Canada is almost the same. Mens rea is attributed to corporations on the principle of "alter ego" of the company.*

64. *So far as India is concerned, the legal position has been clearly stated by the Constitution Bench judgment of this Court in Standard Chartered Bank v. Directorate of Enforcement (2005) 4 SCC 530 . On a detailed consideration of the entire body of case laws in this country as well as other jurisdictions, it has been observed as follows: (SCC p. 541, para 6) "6. There is no dispute that a company is liable to be prosecuted and punished for criminal offences. Although there are earlier authorities to the effect that corporations cannot commit a crime, the generally accepted modern rule is that except for such crimes as a corporation is held incapable of committing by reason of the fact that they involve personal malicious intent, a corporation may be subject to indictment or other criminal process, although the criminal act is committed through its agents."*

35. *It is abundantly clear from the above that the principle which is laid down is to the effect that the criminal intent of the "alter ego" of the company, that is the personal group of persons that guide the business of the company, would be imputed to the company/corporation. The legal proposition that is laid down in the aforesaid judgment is that if the person or group of persons who control the affairs of the company commit an offence with a criminal intent, their criminality can be imputed to the company as well as they are "alter ego" of the company.*

36. *In the present case, however, this principle is applied in an exactly reverse scenario. Here, company is the accused person and the learned Special Magistrate has observed in the impugned order that since the appellants represent the directing mind and will of each company, their state of mind is the state of mind of the company and, therefore, on this premise, acts of the company is attributed and imputed to the appellants. It is difficult to accept it as the correct*

principle of law. As demonstrated hereinafter, this proposition would run contrary to the principle of vicarious liability detailing the circumstances under which a direction of a company can be held liable.

(iii) Circumstances when Director/Person in charge of the affairs of the company can also be prosecuted, when the company is an accused person:

37. *No doubt, a corporate entity is an artificial person which acts through its officers, directors, managing director, chairman etc. If such a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. It would be more so, when the criminal act is that of conspiracy. However, at the same time, it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless the statute specifically provides so.*

38. *Thus, an individual who has perpetrated the commission of an offence on behalf of a company can be made accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Second situation in which he can be implicated is in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.*

39. *When the company is the offender, vicarious liability of the Directors cannot be imputed automatically, in the absence of any statutory provision to this effect. One such example is Section 141 of the Negotiable Instruments Act, 1881. In Aneeta Hada (supra), the Court noted that if a group of persons that guide the business of the company have the criminal intent, that would be imputed to the body corporate and it is in this backdrop, Section 141 of the Negotiable*

Instruments Act has to be understood. Such a position is, therefore, because of statutory intendment making it a deeming fiction. Here also, the principle of "alter ego", was applied only in one direction namely where a group of persons that guide the business had criminal intent, that is to be imputed to the body corporate and not the vice versa. Otherwise, there has to be a specific act attributed to the Director or any other person allegedly in control and management of the company, to the effect that such a person was responsible for the acts committed by or on behalf of the company. This very principle is elaborated in various other judgments. We have already taken note of Maharashtra State Electricity Distribution Co. Ltd. (supra) and S.K. Alagh (supra). Few other judgments reiterating this principle are the following:

15. *It is also important to take note of the fact that the petitioner is a Chartered Account, by profession and he was a Non-Executive Director of the Company. At this juncture, it will be useful to take note of the judgment of the Hon'ble Supreme Court in Chintalapati Srinivasa Raju and Others .Vs. Securities and Exchange Board of India, reported in (2018 5 MLJ 857). The relevant portions of the judgment is extracted hereunder:*

16. *In Pooja Ravinder Devidasani v. State of Maharashtra (2014) 16 SCC 1 at 9, it is stated:*

"17. There is no dispute that the appellant, who was wife of the Managing Director, was appointed as a Director of the Company— M/s Elite International (P) Ltd. on 1-7-2004 and had also executed a letter of guarantee on 19-1-2005. The cheques in question were issued during April 2008 to September 2008. So far as the dishonour of cheques is concerned, admittedly the cheques were not signed by the appellant. There is also no dispute that the appellant was not the Managing

Director but only a non-executive Director of the Company. Non-executive Director is no doubt a custodian of the governance of the company but is not involved in the day-to-day affairs of the running of its business and only monitors the executive activity. To fasten vicarious liability under Section 141 of the Act on a person, at the material time that person shall have been at the helm of affairs of the company, one who actively looks after the day-to-day activities of the company and is particularly responsible for the conduct of its business. Simply because a person is a Director of a company, does not make him liable under the NI Act. Every person connected with the Company will not fall into the ambit of the provision. Time and again, it has <http://www.judis.nic.in> been asserted by this Court that only those persons who were in charge of and responsible for the conduct of the business of the Company at the time of commission of an offence will be liable for criminal action. A Director, who was not in charge of and was not responsible for the conduct of the business of the Company at the relevant time, will not be liable for an offence under Section 141 of the NI Act. In National Small Industries Corpn. [National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal, (2010) 3 SCC 330 : (2010) 1 SCC (Civ) 677 : (2010) 2 SCC (Cri) 1113] this Court observed: (SCC p. 336, paras 13-14) "13. Section 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent 1 was in charge of or was responsible to the accused Company for the conduct of its business. This is in consonance with strict

interpretation of penal statutes, especially, where such statutes create vicarious liability.

14. *A company may have a number of Directors and to make any or all the Directors as accused in a complaint merely on the basis of a statement that they are in charge of and responsible for the conduct of the business of the company without anything more is not a sufficient or adequate fulfilment of the requirements under Section 141." Non-executive directors are, therefore, persons who are not involved in the day to day affairs of the running of the company and are not in charge of and not responsible for the conduct of the business of the company.*

17. *An instructive judgment of Lord Halsbury is contained in Dovey and the Metropolitan Bank v. John Cory [1901] AC 477. The Lord Chancellor put it thus:*

"The charge of neglect appears to rest on the assertion that Mr. Cory, like the other directors, did not attend to any details of business not brought before them by the general manager or the chairman, and the argument raises a serious question as to the responsibility of all persons holding positions like that of directors, how far they are called upon to distrust and be on their guard against the possibility of fraud being committed by their subordinates of every degree. It is obvious if there is such a duty it must render anything like an intelligent devolution of labour impossible. Was Mr. Cory to turn himself into an auditor, a managing director, a chairman, and find out whether auditors, managing directors, and chairmen were all alike deceiving him? That the letters of the auditors were kept from him is clear. That he was assured that provision had been made for bad debts, and that he believed such assurances, is involved in the admission that he was guilty of no moral fraud; so that it comes to

this, that he ought to have discovered a network of conspiracy and <http://www.judis.nic.in> fraud by which he was surrounded, and found out that his own brother and the managing director (who have since been made criminally responsible for frauds connected with their respective offices) were inducing him to make representations as to the prospects of the concern and the dividends properly payable which have turned out to be improper and false. I cannot think that it can be expected of a director that he should be watching either the inferior officers of the bank or verifying the calculations of the auditors himself. The business of life could not go on if people could not trust those who are put into a position of trust for the express purpose of attending to details of management. If Mr. Cory was deceived by his own officers - and the theory of his being free from moral fraud assumes under the circumstances that he was - there appears to me to be no case against him at all. The provision made for bad debts, it is well said, was inadequate; but those who assured him that it was adequate were the very persons who were to attend to that part of the business, and so of the rest. If the state and condition of the bank were what was represented, then no one will say that the sum paid in dividends was excessive.

(at pages 485-86) Per Lord Davey, it was held:

"In this state of the evidence, my Lords, I ask whether the course of business at the board meetings, as described by the respondent, was a reasonable course to be pursued by the respondent and other directors, or whether the knowledge which might have been derived from a careful and comparative examination of the weekly states and quarterly returns from the different branches of the bank ought to be imputed to the respondent, or (alternatively) whether he was guilty of such neglect of his duty as a director as

would render him liable to damages. I do not think that it is made out that either of the two latter questions should be answered in the affirmative. I think the respondent was bound to give his attention to and exercise his judgment as a man of business on the matters which were brought before the board at the meetings which he attended, and it is not proved that he did not do so. But I think he was entitled to rely upon the judgment, information, and advice of the chairman and general manager, as to whose integrity, skill, and competence he had no reason for suspicion. I agree with what was said by Sir George Jessel in *Hallmark's Case*, and by Chitty J. in *In re Denham & Co.*, that directors are not bound to examine entries in the company's books. It was the duty of the general manager and (possibly) of the chairman to go carefully through the returns from the branches, and to bring before the board any matter requiring their consideration; but the respondent was not, in my opinion, guilty of negligence in not examining them for himself, notwithstanding that they were laid on the table of the board for reference. The case is no doubt one of some difficulty, but the appellant has not made out to my satisfaction that the respondent wilfully (as that term is explained in the cases I have referred to) misappropriated the company's funds in payment of dividends." (at pages 492-493)

18. It is also important to note that the appellant attended only six out of ten board meetings of SCSL for the period that he was a non-executive director. The appellant was not involved in any business development, diversification plans and advise on new ventures of SCSL post 1999. It was also held by the minority judgment that the findings of the Whole Time Member and the majority went clearly beyond the show cause notice, which, when read with Annexure 15 thereof, makes it clear that the appellant is only sought to be roped in as a promoter. Once it is found that he is not a promoter, then the basis of

the show cause notice goes as also the basis of the impugned judgment.

16. *From the above judgments, it is clear that even though the corporate entity is an artificial person which acts through its Officers, Directors, Chairman etc., if such a Company commits an offence involving mens rea, it would normally be the intent and action of that individual, who acted on behalf of the Company. A person, who has perpetrated the commission of an offence on behalf of a Company can be made as an accused, along with the Company, if there is sufficient evidence of his active role coupled with criminal intent [emphasis supplied]. This is the cardinal principle of criminal jurisprudence, unless the statute specifically provides for the applicability of the doctrine of vicarious liability like in the case of Negotiable Instruments Act, 1881, Employees Provident Fund Act, 1952, Food Safety and Standards Act, 2006, etc.*

17. *In case of a Non-Executive Director, they cannot be presumed to be involved in the day-to-day affairs of the running of the Company and they cannot be made liable just because they have attended Board Meetings or signed Balance Sheets.*

18. *In the instant case, the only allegation that is found against the petitioner in the Final Report and in the materials collected by the prosecution during the course of investigation, is that the petitioner did not interfere with the illegal act committed by A-1 to A-3, and thereby he has abetted the commission of crime under Section 109 of IPC. Therefore, the prosecution has proceeded against the petitioner more on an assumption and by applying the principle of vicarious liability, without there being any material to show that the petitioner had perpetrated the commission of the offence, by playing an active*

role coupled with criminal intent. Unless, this minimum requirement is satisfied, the petitioner cannot be made as an accused in this case.

19. *Even to rope in the petitioner under Section 109 of IPC, the prosecution must establish the element of mens rea and a positive act on the part of the petitioner. Negligence or carelessness or even facilitation cannot be termed to be abetment and abetment is not a matter of mere suspicion or surmises. Therefore, even if the entire materials are taken as it is, along with the allegations made in the Final Report, this Court does not find even an iota of evidence against the petitioner to rope him for the offence of abetment.*

20. *In the considered view of this Court, there are no materials available against the petitioner to proceed further against him before the Court below. It is true that even a strong suspicion is enough to frame charges against an accused person. If material is available, this Court cannot go into it and analyse such materials at this stage. However, such a suspicion must be based on some material and not on mere assumptions or surmises. In this case, no material is available against the petitioner.*

11.6. On the basis of the above, he submits that criminal proceedings insofar as petitioners in Crl.P Nos.5084/2020 and 5092/2020 are concerned is required to be quashed.

12. Heard Sri.Udaya Holla, learned Senior Counsel appearing for the petitioner in CrI.P No.3426/2020 and for respondent No.2 in CrI.P No.7780/2020, Sri.Mohammed Shakeeb, learned counsel appearing for respondent No.2 in CrI.P No.3426/2020, for petitioners in CrI.P No.7780/2020 and for respondent No.2 in CrI.P No.5092/2020 and 5084/2020 and Sri.D.P.Singh, learned counsel appearing for petitioners in CrI.P Nos.5084/2020 and 5092/2020 and perused the papers.

13. From the averments made by counsel for the parties, the points that would arise for determination by this Court are:

13.1. **When a complaint and a counter complaint are filed, can an accused in one complaint contend that the complaint against him is required to**

be quashed on the ground that the allegations are civil in nature when the said accused has filed a counter complaint making identical allegations that those very offences are criminal in nature?

13.2. Whether a Director appointed by a Venture Capital Company can be prosecuted as regards criminal offences alleged against the company where investment is made?

13.3. What order?

14. Answer to Point No.1: When a complaint and a counter complaint are filed, can an accused in one complaint contend that the complaint against him is required to be quashed on the ground that the allegations are civil in nature when the said accused has filed a counter complaint making identical allegations that those very offences are criminal in nature?

14.1. In the extensive arguments advanced by Sri.Udaya Holla, learned Senior Counsel appearing for 'NoBroker' as also Sri.Mohammed Shakeeb, learned counsel appearing for 'Mygate' both of them have tried to support the complaints filed by their respective clients against the other contending that the allegations made in their respective complaints is proper and correct and would require investigation. However, when it comes to the complaint filed against their clients, they would contend that the allegations made are totally false and therefore, the proceedings against their respective clients are required to be quashed.

14.2. I have gone through the contents of the petitions, objections as also documents

filed. The documents filed give rise to a very sorry state of affairs between two companies who claim to be the leaders in their field. The documents produced would indicate the mud slinging campaign resorted to by both companies against each other. Though there are criminal complaints filed, investigation is in progress and this Court is seized of the matter, it is seen from the documents produced that while the above matter was pending before this Court both 'NoBroker' and 'Mygate' have involved themselves in a vicious battle in the social media like facebook, whatsapp, twitter, etc. The contents of the said posts in those social media indicates as if there is a no holds barred battle between 'NoBroker' and

'Mygate' in the social media each making allegations and counter allegations against the other.

- 14.3. The contentions of both the parties have been detailed hereinabove. As could be seen both of them have alleged to have set up mock clients, mock accounts, mock customer which data was not available in the public domain. However, some how the other got hold of the said data, information and contacted the mock client with a proposal to render its services. It is on this basis that each of them claim that the other has stolen its data and for this reason, criminal action is proposed to be taken against the other.

14.4. Though the learned Senior Counsel appearing for 'NoBroker' and learned counsel appearing for 'Mygate' contend in respect of complaints filed against their respective clients that the offences alleged are commercial in nature, civil in nature and criminal proceedings ought not to be continued, however, when it came to complaints by their respective clients they wanted the investigation to go on.

14.5. One of the cardinal rules for a party to claim for quashing of the criminal proceedings on the ground that the allegations made therein are relating to a civil dispute is that such a person ought not to have filed a criminal complaint on the very same set of facts and/or on very similar allegations.

14.6. In the present case, both 'Mygate' and 'NoBroker' have made similar if not identical allegations against each other. According to both of them their data has been stolen by the other. Having made such a complaint against the other, it would not now lie for either of the parties to contend that the complaint filed against their clients cannot be continued since the disputes are commercial in nature.

14.7. **I Answer Point No.1 by holding that, once a party files a criminal complaint against the other and if such other were to file a criminal complaint against the first complainant, then the first complainant cannot be heard to say that the second complaint is**

purely commercial and has to be quashed. When there is a complaint and counter complaint filed on the basis of similar allegation alleging criminal offences neither of the parties can be heard to say that the complaint against it is civil/commercial in nature, while the complaint filed by it is proper and correct.

14.8. In view of the above discussion, I am of the considered opinion that both the complaint and counter complaint cannot be quashed. As such Criminal Petition No.3426/2020 and Crl.P No.7780/2020 are required to be dismissed and are so dismissed. However, since there is a complaint

and counter complaint, it is required that both of them are investigated by the very same police. The complaint filed by 'Mygate' has been registered as Crime No.9/2020 by CID Police on 19.06.2020 and the complaint filed by 'NoBroker' has been registered as Crime No.155/2020 on 28.06.2020 by the Bellandur Police Station. In view thereof, I direct the complaint in Crime No.155/2020 to be transferred from Bellandur Police Station to CID Police Station. The first respondent in Crl.P No.3426/2020 viz., CID Police Station is directed to investigate the Crime No.9/2020 and Crime No.155/2020 together.

15. Answer to Point No.2: Whether a Director appointed by a Venture Capital Company can be prosecuted as regards criminal offences alleged against the company where investment is made?

15.1. Sri.D.P.Singh, learned counsel appearing for petitioners in Crl.P No.5092/2020 and 5084/2020 has sought to contend that the petitioners therein are nominal Directors and/or investee Directors appointed by the Venture Capital Company and as such by relying on the Master Circular No.1/2011 and General Circular No.1/2020, he submitted that no criminal proceedings could be taken up against the nominal Directors.

15.2. The Master Circular applies to only Directors who are appointed in listed companies where the Securities and Exchange Board of India (SEBI) requires nomination of certain Directors designated as independent Directors; the Directors shall be nominated in public sector undertakings by the respective Government and the Directors shall be appointed by Public Sectors Financial Institutions and/or Banks in a Company and/or Directors nominated by the Government under Section 408 of the Companies Act, 1956. None of these requirements are fulfilled by the petitioners in the present case. Therefore, the Master Circular No.1/2011 would not be attracted to these investee Directors.

15.3. As regards the General Circular No.1/2020 again the same would apply only to the Directors nominated by the Government in Public Sector Undertakings, the Directors nominated by the Public Sector Financial Institutions and the Directors appointed due to regulatory requirement by NCLT. These Directors have been referred to therein as independent Directors and/or non-executive Directors. Even this General Circular would not be applicable to the petitioners in Crl.P No.5092/2020 and 5084/2020 since those requirements are not satisfied.

15.4. They have been appointed by the venture capital company or entity who has invested in No Broker, they have no

independent existence, they having been appointed to protect the interest of the venture capitalist.

- 15.5. By relying on the judgment in **Girdhari Lal Gupta's** case (supra), it is sought to be contended that the investee Directors are not the persons in charge of and responsible for the conduct of the affairs of the Company inasmuch as they are non executive Directors. Relying on **Harmeet Singh Paintal's** case (supra), it is contended that unless there are specific averments made against a particular Director, no criminal proceedings could be initiated against such Director. There cannot be vicarious liability just on the basis of such a person being a Director. There must be overt act committed by

such person to be arrayed as an accused.

By relying on ***Sunil Bharti Mittal's*** case (supra), it is contended that the investee Directors have not acted on behalf of the Company in respect of the allegations made in the complaint, there is no allegations made against the investee Director of they having stolen any data and/or contacted any mock clients. They being mere investee Directors unless there is specific allegations made against them no criminal proceedings could be continued.

15.6. The said principles are now required to be applied to the allegations made in the complaint by 'Mygate' against 'NoBroker' and these investee Directors.

15.7. ***In Girdhari Lal Gupta*** (supra), it was held that "*a person in-charge and responsible for the conduct of the affairs of a company*" would mean a person in over-all control of the day to day business of the company or firm. The life blood of a company is its finances, the so called investee directors being incharge of the finances, it cannot be said that they are not responsible for the conduct of the Company. There is a periodical review conducted as regards the performance of the company, audit conducted as regards the amounts spent, which would be the basis for the investor to release funds or further invest in the company. There being a strict financial control exercised by the

investor company as regards the financial affairs of nobroker.

- 15.8. ***Harmeet Singh Paintal's case*** (supra), it has been held that "*if the accused is a Director or an officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in the complaint.*" Admittedly the Investee Directors were incharge of the finances and there could be no financial decision taken without their concurrence and/or approval. The entire offence alleged against the company requiring the use of substantial financial resources of the company, it cannot at this stage be said that the investee Directors had no role to play in the same. It is not their case that they were not aware of the

business, the only defence being that they were not incharge of the day to day affairs, this aspect in my considered opinion can only be considered after investigation is complete and not at the stage of registration of the FIR.

- 15.9. ***In Sunil Bharti Mittal's case*** (supra), it was held that *"It is abundantly clear from the above that the principle which is laid down is to the effect that the criminal intent of the "alter ego" of the company, that is the personal group of persons that guide the business of the company, would be imputed to the company/corporation. The legal proposition that is laid down in the aforesaid judgment in Iridium India case is that if the person or group of persons who control the affairs of the*

company commit an offence with a criminal intent, their criminality can be imputed to the company as well as they are "alter ego" of the company." This being relatable to the prosecution of a company for a criminal offence. Applying the said dicta to the present case the company can be prosecuted for a criminal offence as that complained of in the present case so also could any officer of the company who controls the affairs of the company, in the present case the investee directors controlling the finances of the company, it cannot at this stage be said that they are not in charge of the affairs of the company, or did not have a say in the manner of running of the company, which

is however subject to investigation and/or trial.

15.10. ***In Standard Chartered Bank's case***

(supra), it was held that "*In the case of a Director, Secretary or Manager [as defined in Section 2(24) of the Companies Act] or a person referred to in clauses (e) and (f) of Section 5 of the Companies Act, an averment in the complaint that he was in charge of, and was responsible to the company, for the conduct of the business of the company is necessary to bring the case under Section 141(1) of the Act. No further averment would be necessary in the complaint, though some particulars will be desirable. They can also be made liable under Section 141(2) by making necessary averments relating to consent and*

connivance or negligence, in the complaint, to bring the matter under that sub-section." Applying the said dicta to the present case it is seen that there are sufficient averments made in the complaint against the investee directors making allegation as regards their involvement and at this stage it cannot categorically be said that they are not involved.

15.11. Admittedly the Petitioners in Crl Pet no 5084 of 2020 and 5092 of 2020 are investee directors in that they have been nominated on the board by the venture capital firm which has invested in the company. These Directors would have knowledge of what is discussed during the board meetings and the steps that are being taken in respect of the business of

the company. The documents which have been produced by 'MyGate', indicates a concerted campaign by 'Nobroker' to contend that the services offered are superior to that of 'Mygate' as also making scathing remarks on 'Mygate's' business and activity, all these at this stage cannot be said have been carried out without the Investee director's involvement. When admittedly they are appointed for the purpose of maintaining financial integrity and or discipline of the investee company by the venture capital company.

15.12. The Directors who are appointed by the investor company, cannot be said to be independent directors and/or nominal directors of the company. They admittedly have an important role to play in the

financial decisions of the Company, without which the day-to-day activities of the company cannot be performed.

15.13. The actions taken by 'Nobroker' are admittedly to increase the revenue and or business of 'Nobroker', the direct beneficiary of which would be the investor, venture capital company.

15.14. It is but required for the so called investee directors who are vested with the obligation of maintaining the financial integrity or discipline of the company to see to it that 'Nobroker' does not spend monies in an improper manner and or for commission of criminal offences, that being their sole duty on the board. Since monies have been spent on the

commission of the offences and financial benefit derived by the investor company from such action, it cannot without investigation be categorically stated that the investee directors were not involved in the commission of the offence as alleged.

15.15. The documents produced as observed above indicates substantial use of the financial resources of no-broker in the commission of the offences if proved, which could not have been done without the concurrence and/or approval of the investee directors.

15.16. For all the aforesaid reasons it cannot at this stage be said that the investee directors were not in charge of or were not knowledgeable of or did not participate in

the commission of the offence, for the purposes of exercise of jurisdiction under section 482 of the Cr.P.C.

15.17. I answer Point No.2 by holding that a Director appointed by a Venture Capital Company can be prosecuted as regards criminal offences alleged against the company where investment is made, subject however to the investigation disclosing their involvement in the commission of the offence. Merely because a director has been appointed by an investor - venture capital company, it cannot be said that such a Director is a nominal or a non-executive director of the company, to seek for quashing an FIR. The aspect of involvement of such a

director in the offence can only be ascertained after investigation is completed. Such a director cannot be compared with an Independent Director who has no role to play in the business of the company and does not derive any benefit therefrom. A director appointed by an investor to safeguard the investment made by the investor cannot be said to be independent.

16. **Answer to Point No.3:** What order?

16.1. In the result, CrI.P No.3426/2020, CrI.P No.7780/2020, CrI.P No.5084/2020 and CrI.P No. 5092/2020 are dismissed.

16.2. The observations made herein are only for the purposes of consideration of the petitions under Section 482 of the Cr.P.C and have been necessitated due to the extensive arguments advanced by the counsels in this regard. The investigating agency to proceed with the investigation uninfluenced by the observations made herein.

**Sd/-
JUDGE**

Prs*