

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Order delivered on: 20th January, 2015

+ **Crl. M.C. No.4242/2014**

VINOD KASHYAP & ORS Petitioners
Through Mr.Dayan Krishnan, Sr.Adv. with
Mr.Madhav Khurana,
Mr.Abhimanyu Mahajan, Mr.Amrit
Grewal and Ms.Manvi Priya, Advs.

versus

CBI Respondent
Through Mr.Narender Mann, SPP for CBI
with Mr.Manoj Pant &
Ms.Utkarsha Kohli, Advs. along
with Insp. S.S.Yadav, in person.

**CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH**

MANMOHAN SINGH, J. (ORAL)

1. The petitioners have filed the present petition under Section 482 Cr.P.C. seeking quashing of the order dated 4th September, 2014 passed by the Court of Special Judge CBI-05, Patiala House Courts, in the case titled as *CBI v. S.K. Khanna & Ors.*, being RC No.2172011A0008/ACU-IV/CBI/New Delhi, under Sections 120-B/420 IPC read with Sections 13(2) & 13(1)(D) of the Prevention of Corruption Act, thereby summoning the petitioners.
2. On 30th June, 2011, the CBI registered the above said RC against the petitioners and some other persons. It was alleged that

the accused public servants entered into a criminal conspiracy with the other co-accused and created false records in respect of number of employees engaged, inflated the number of excluded employees and thereby manipulated the amount of provident fund liability which was due and payable by M/s. B.L.Kashyap & Sons Ltd.

3. Mr.Dayan Krishnan, learned Senior counsel appearing on behalf of the petitioners has referred Annexure P-1, i.e. copy of the charge-sheet and the order dated 4th September, 2014 passed by the Court of Special Judge PC Act (CBI-05), New Delhi in the case titled as *CBI v. S.K. Khanna & Ors.* He has also referred paras 12 & 13 of the charge-sheet which read as under:-

“12. The allegations mentioned in the FIR against Sh. M.S. Kalia, Sh. Anoop Kumar Sharma, Sh. Rajib Mukherjee, Sh. Sudhir Batra, Sh. R.S. Tanwar and Smt. Promilla Singh could not be substantiated during the investigation. Also, the investigation did not reveal any direct role individually, on the part of Sh. Vinod Kashyap, Sh. Vineet Kashyap and Sh. Vikram Kashyap, Directors of M/s BLKS.

13. Regarding the quantum of loss alleged in the FIR, i.e. Rs.169,50,34,065/-, the investigation has revealed that the loss has been alleged on the basis of various assumptions. The competent authority in EPFO, under the proceedings u/s 7(A) of EPF & MP Act, 1952, has vide, order dated 29.7.2011, quantified the PF dues of M/s BLKS to the tune of Rs.592,76,54,931/-. The company i.e. M/s BLKS challenged the said order in the EPFO Appellate Tribunal and the latter, vide order dated 13.5.2014 set aside the said order dated 29.7.2011. The competent authority u/s 7(A) is a quasi-judicial authority. It would be against the settled provisions of law to sit on the judgment and findings of a quasi-judicial authority.

Further, as per the EPF & MP Act, 1952, the authority conducting the proceedings u/s 7(A) is competent to file complaint with regard to the use of forged documents during the said proceedings in the court of competent jurisdiction. However, to the extent that forged documents have been used during the inspection, further investigation is continuing u/s 173(8) of Cr.P.C. and supplementary report would be filed in the Court of Competent Jurisdiction, once the further investigation is finalized.”

4. Learned Senior counsel has also referred para 2 of the reply filed by the CBI which also reads as under:-

“As regards para-2, it is submitted that the averments made therein are admitted to the extent that investigation did not reveal any direct role individually, on the part of Sh. Vinod Kashyap, Sh. Vineet Kashyap and Sh. Vikram Kashyap, Directors of M/s B.L. Kashyap & Sons Ltd. only for the allegations for which charge sheet has been filed. However, M/s B.L. Kashyap & Sons Ltd. has been charge sheeted through its Representative u/s 305 (2) Cr.P.C. Moreover, further investigation u/s 173 (8) Cr.P.C. in the instant case with regard to the use of forged documents as genuine by M/s. B.L. Kashyap & Sons Ltd. during the inspection of EPFO officials at its work sites and filing of false monthly PF returns with EPFO by the official of the company and its Directors, is continuing and the role of each and every person of the company including petitioners is being looked into.”

5. In support of his submissions, learned Senior counsel referred the recent judgment passed by the Supreme Court, dated 9th January, 2015, in the case of **Sunil Bharti Mittal v. Central Bureau of Investigation**, Criminal Appeal No.34 of 2015 along with Criminal

Appeal Nos.35 of 2015 and 36-37 of 2015. The relevant paras of the said judgment read as under:-

“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:

1. Jethsur Surangbhai v. State of Gujarat, (1984) Supp. SCC 207

“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. Tehsildar 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.”

2. Sham Sunder v. State of Haryana, (1989) 4 SCC 630

“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.”

3. Hira Lal Hari Lal Bhagwati v. CBI, (2003) 5 SCC 257

“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.”

4. **Maksud Saiyed v. State of Gujarat, (2008) 5 SCC 668**

“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.”

5. **R. Kalyani v. Janak C. Mehta, (2009) 1 SCC 516**

“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.”

6. **Sharon Michael v. State of T.N., (2009) 3 SCC 375**

“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.”

7. **Keki Hormusji Gharda v. Mehervan Rustom Irani, (2009) 6 SCC 475**

“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. Special Judicial Magistrate* (1998) 5 SCC 749 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.”

6. Learned Senior counsel states that in view of the settled law, the summoning order passed by the learned Trial Court in the present case is contrary to the law laid down by the Supreme Court as well as the charge-sheet filed by the CBI against the Directors. He admits that the samples of the signatures of the said Directors have already been taken by the CBI and in case any supplementary charge-sheet is filed on the basis of the report, the learned Trial Court can pass a fresh order for summoning of the Directors if such situation would arise.

7. Mr.Mann, Spl. PP for the CBI does not dispute the contents of the charge-sheet, reply as well as the law laid by the Supreme Court.

8. In view of the above, I find force in the submissions of the learned counsel for the petitioners. Accordingly, the impugned order dated 4th September, 2014 as well as the consequent proceedings

arising therefrom are quashed, as the same is not sustainable. However, it is clarified that in case the supplementary charge-sheet is filed on the basis of the report having the involvement of the petitioners/Directors, the learned Trial Court would be at liberty to pass an appropriate orders of summoning the petitioners/Directors in accordance with law but at the same time, the petitioners would also be entitled to recourse the remedy available as per law.

9. The present petition is accordingly disposed of.

(MANMOHAN SINGH)
JUDGE

JANUARY 20, 2015