IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 28 OF 2015

Atul S/o Ramesh Rumale,
Age : 44 years, Occu.: Advocate,
R/o – Baliram Peth, Jalgaon .. Petitioner

Vs.

1] The State of Maharashtra,
Through the Investigating Officer,
Jalgaon City Police Station,
Jalgaon, Taluka and
District Jalgaon

2] Kishor S/o Rajaram Chhabria,
Age : 59 years, Occu.: Business,
Chairman of M/s Allied Blenders &
Distillers Ltd., having its registered
Office at 397/C, Ground Floor,
Lamington Chambers, Lamington Road,
Mumbai

3] BDA Ltd. Company,
through its Chairman,
Mr. Kishor Rajaram Chhabria,
Age : 59 years, Occu.: Business,
Chairman of M/s Allied Blenders &
Distillers Ltd.,
having its registered Office at
12, Evergreen Industrial Estate,
Shakti Mills Lane, Mahalaxmi,
Mumbai – 400 011
at present 397/C, Ground Floor,
Lamington Chambers,
Lamington Road, Mumbai

4] Mr. B.D. Vartak,
Age : Major, Occu.: Service
as Sales Manager of BDA Ltd. Company,
R/o : 24, Khetan Bhavan,
198, Jamshedji Tata Road,
Churchgate, Mumbai – 400 020

5] Mr. B.K. Irani,
Age : Major, Occu.: Service
as Marketing Manager of BDA Ltd. Company,
R/o : 24, Khetan Bhavan,
198, Jamshedji Tata Road,
Churchgate, Mumbai – 400 020

6] Mr. Rajesh Agrawal,
Age : Major, Occu.: Service
as Marketing Officer of BDA Ltd. Company,
R/o : 24, Khetan Bhavan,
198, Jamshedji Tata Road,
Churchgate, Mumbai – 400 020 .. Respondents

[Resp. No.2 to 6 – Orig. accused.]

Mr. A.P. Bhandari, Advocate for the petitioner

Mrs. R.P. Gour, APP for the respondent/State

Mr. Pervez M. Rustomkhan, Advocate with Mr. P.K. Joshi, Advocate with Mr. Maneck Mulla, Advocate and Mr. Joydeep Chatterji, Advocate for respondent no.2

CORAM : V.K. JADHAV, J.
RESERVED ON : 13/10/2016
PRONOUNCED ON : 24/10/2016

JUDGMENT:

Rule. Rule made returnable forthwith. The writ petition is heard finally with consent of the learned counsel for the parties, at the admission stage.

2. Being aggrieved by the judgment and order passed by the Sessions Judge, Jalgaon dated 21/11/2014 in Criminal Revision Application No. 60 of 2011, the original complainant has preferred the present Writ Petition.

3. Brief facts giving rise to the present Writ Petition, are as follows :-

. The petitioner possesses license for consumption of liquor issued in his favour in accordance with law and the said license was renewed time to time. It was valid on the date of the incident. BDA Company Ltd. is dealing in the business of manufacture and sales of alcoholic beverages including whisky, beer etc. On 23/1/2004, there was a religious function arranged by the petitioner at his house and as per the tradition, the petitioner had prepared the non vegetarian food by inviting 70-75 persons. Even on the request of the guests/invitees, the petitioner had to arrange liquor for consumption. Consequently, the petitioner went to Ashok Brandy Center at Jalgaon for purchasing the liquor. At that time, the petitioner was informed that there is a scheme of various gifts for the purchase of the "Officer's Choice Whisky" of BDA Company Ltd. On enquiry, the shop owner gave a pamphlet to the petitioner, wherein it was specifically mentioned that a person would get a Santro car, if he succeeds in collecting 125 points. The scheme was introduced as "Officer's Choice Dhakkan Se Santro Tak" and by adding points starting from 0 to 6 printed inside the caps, the purchaser would get Santro car, if he collects 125 points. The petitioner therefore was convinced to purchase the entire carton of Officer's Choice whisky. In view of the launching of the said scheme and the possibility of getting the gift, the petitioner had also shown his liquor license to the shop owner and purchased the box with the bill. On the same day, the petitioner had served the said whisky to the invitees and succeeded in collecting 45 caps of the bottle and earn 125 points thereby. The petitioner had therefore approached the shop owner. Accordingly, the shop owner had issued receipt of the said caps in favour of the petitioner on 23/1/2004. According to the petitioner, original accused no.3 to 5 again came to Jalgaon on 25/1/2004 at the shop and also called the petitioner in the said shop named and styled as Ashok Brandy Center and after verification of the documents, passed the endorsement to the effect that the intimation regarding the winner by post will be given. The petitioner was assured that he will get the prize/gift, however, on 19/2/2004, the petitioner received a letter from the accused no.1-Company, asking him to submit certain documents after verification of the same by the Government Officer. In response to the said letter, the petitioner had also furnished documents and requested the accused persons to give him the gift as per the said scheme. As per the communication dated 16/3/2004, the petitioner was informed that his claim for the gift articles stands cancelled. In the said communication, certain grounds are mentioned for cancellation/rejection of the claim of the petitioner. The petitioner has filed complaint before the Chief Judicial Magistrate, Jalgaon being RCC No.249 of 2004 against the respondent/accused for having committed the offences punishable under section 417, 420, 427 r/w. section 34 of the Indian Penal Code.

. Initially, by order dated 3/12/2008, the learned Judicial Magistrate First Class was pleased to issue the process against the respondent/accused, however, the respondent no.6 herein has challenged the said order of issuance of process by filing Criminal Revision Application No.17 of 2009. The learned Sessions Judge, Jalgaon, by judgment and order dated

21/12/2009 passed in Criminal Revision Application No.17 of 2009, partly allowed the Revision Application and thereby directed the Magistrate to hold enquiry in accordance with the provisions of section 202 of the Code of Criminal Procedure and, thereafter, to proceed further with the matter, in accordance with law. In the peculiar facts and circumstances of the case and by consent of the parties, the learned Sessions Judge has further directed that the complaint shall be dealt with by the learned Chief Judicial Magistrate, Jalgaon.

. In compliance of the directions given by the learned Sessions Judge, as aforesaid, the learned Chief Judicial Magistrate, by order dated 16/1/2010 initiated an enquiry, as provided under section 202 of the Code of Criminal Procedure and report was called. Since the said order, directing enquiry into the matter, was running contrary to the directions issued by the Sessions Judge in the said Criminal Revision Application, the petitioner filed application below Exhibit 8 for recalling the said order, and conducting the enquiry by the Court itself. Thus, by order dated 13/8/2010, the learned Chief Judicial Magistrate, Jalgaon was pleased to direct the petitioner to led evidence before issuance of process. Accordingly, the petitioner led his evidence before issuing the process and also examined Mr. Mohanlal Bharwani, the owner of the shop – Ashok Brandy Center. On consideration of the material placed on record, the learned Chief Judicial Magistrate, by order dated 8/3/2011, issued process against accused nos.1 to 5 for the offences punishable under section 420, 427 r/w. 34 of the Indian Penal Code.

. Being aggrieved by the order of issuing process, the respondent no.2 herein preferred Criminal Revision Application No. 60 of 2011 before the Sessions Court, Jalgaon. The learned Sessions Judge, Jalgaon by impugned judgment and order dated 21/11/2014, allowed the revision application and set aside the order passed below Exhibit 1 dated 8/3/2011 passed by the learned Chief Judicial Magistrate, Jalgaon in RCC No. 249 of 2004, to the extent of criminal revision petitioner/present respondent no.2 and further set aside the issuance of process under section 427 of the Indian Penal Code against all the accused persons. The learned Sessions Judge, Jalgaon has dismissed the complaint bearing R.C.C. No.429 of 2004 against the respondent no.2 herein. Hence, this Criminal Writ Petition.

4. Learned counsel for the petitioner submits that initially, order dated 3/12/2008 passed by the learned Judicial Magistrate First Class, issuing process against all the accused was not challenged by the present respondent no.2 and as such, it was impermissible for the present respondent no.2 to challenge the subsequent order of issuance of process after remand of the matter, by preferring Criminal Revision Application No.60 of 2011. The learned Sessions Judge, Jalgaon has not considered this aspect while disposing of Criminal Revision Application No.60 of 2011. Learned counsel submits that before the revisional Court, the present respondent no.2 has placed on record various documents including the board resolutions, certified copy of the extract from the Registrar of Companies etc. Learned Sessions Judge has considered copy of the extract issued by the Registrar of Companies on 24/8/2005 in respect of M/s. Herberston Ltd. The learned Sessions Judge has observed that the said copy of the extract indicates

that the respondent no.2 was whole time director of M/s. Herberston Ltd. for the period from 21/12/1992 to 23/3/2005 and as such, he could not have been director of another company in charge of the affairs during the said period. Learned counsel submits that the scope of the enquiry under section 202 of the Code of Criminal Procedure is extremely limited and the aim of such enquiry is only to the ascertainment of the truth or the falsity of the allegations made in the complaint - (i) on the basis of the material placed by the complainant; (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and (iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have.

5. Learned counsel for the petitioner submits that the learned Sessions Judge has committed grave error of law by considering the possible defence of the accused. The defence raised by the respondent no.2 before the Sessions Judge are factual in nature and the said factual position is required to be established on the basis of the acceptable evidence.

The defences raised on behalf of the accused will have to be substantiated through cogent evidence and thereupon, the same will have to be examined on merits.

6. Learned counsel for the petitioner submits that the BDA Company Ltd. had launched the scheme for promotion of its business and the petitioner/original complainant has satisfied the entire terms and conditions of the said scheme. Though he was eligible for the gift, as per the conditions laid down in the scheme, without any justifiable reason and on the flimsy grounds, the BDA Company Ltd. has denied the genuine claim of the complainant. At the stage of issuance of process, it cannot be stated that the said scheme was introduced by the Company without permission/knowledge/consent of its Body Corporate i.e. the chairman, vice chairman and the directors of the Company. Learned counsel submits that the director, chairman and vice chairman are liable for business of the Company and they cannot escape from the corporate criminal liability. The petitioner/complainant has made specific allegations in paragraph no.7 of the complaint about the role

played by the respondent no.2. Respondent no.2 herein passed the remarks with his signature on the application of the petitioner, to the effect that the petitioner shall be intimated regarding the winners by post. Learned counsel submits that prima facie, it appears from the rejection of the claim of the petitioner that since inception, the fraudulent intention was shared by all the accused persons while introducing the said scheme. Learned counsel submits that the Magistrate has correctly issued the process, however, the learned Sessions Judge has exceeded his revisional jurisdiction and passed improper, illegal and incorrect order.

7. In order to substantiate his submissions, learned counsel for the petitioner places reliance on the following cases :-

(i) **Vinod Raghuvanshi V. Ajay Arora and Ors. AIR 2014 SC (Supp) 1516;**

(ii) **Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi & Ors. AIR 1976 SC 1947 - 2014 ALL SCR (O.C.C.) 225;**

(iii) **Shridhar Vinayak Modgi Vs. Ravindra Khanderao Hajare & Anr. 2003 ALL MR (Cri) 2210;**

(iv) **Anil Saran Vs. State of Bihar and anr. AIR 1996 SC 204;**

(v) **Nupur Talwar V. Central Bureau of Investigation and anr. AIR 2012 SC 1921;**

(vi) **Aneeta Hada Vs. M/s. Godfather Travels & Tours Pvt. Ltd. [2012] 3 Supreme 416;**

(vii) **Helios & Matheson Information Technology Ltd. & Others Vs. Rajeev Sawhney & Another [2012] 1 SCC 699;**

(viii) **Dr. Mrs. Nupur Talwar Vs. C.B.I. Delhi and anr. [2012] 2 ADJ (SC) 763;**

(ix) **Nupur Talwar Vs. Central Bureau of Investigation & Anr. [2012] 4 Supreme 158;**

(x) **State of Orissa Vs. Debendra Nath Padhi [2004] (8) Supreme 568;**

(xi) **Rajesh Bajaj Vs. State NCT of Delhi and others AIR 1999 SC 1216 (1);**

(xii) **Globe Motors Ltd. Vs. Mehta Teja Singh and Company [1983] 0 Supreme (Del) 4772.**

8. Learned counsel for respondent no.2 submits that the petitioner/complainant, who is a practicing lawyer, has made false statement in the complaint that he had written letter dated 1/3/2004 to respondent

no.2, whereas the letter dated 1/3/2004 is addressed by the petitioner to the General Manager (Marketing), BDA Company Ltd. The complainant has also falsely stated in the complaint that the respondent no.2, in the capacity as chairman of respondent – Company signed the letters dated 19/2/2004 and 16/3/2004, whereas the letters clearly show that those letters were written and sent by a person from the Marketing Department of the respondent – BDACompany Ltd. Learned counsel submits that there are no specific allegations against the present respondent no.2. Respondent no.2 has not made any representation and/or addressed and/or sent any letter, as he is not involved in the day-to-day affairs of the respondent – BDA Company Ltd. There are no allegations in the complaint that the respondent no.2 had made any representation to the petitioner nor at the relevant time, the respondent no.2 was having control over the management/administration of the Company or that he was looking after the day-to-day affairs of the company. It has only alleged in the complaint that the respondent no.2 had sent letters dated 19/2/2004 and 16/3/2004. In-fact, those letters were sent by a person from Marketing Department of respondent - BDA

Company Ltd. Thus, the petitioner/original complainant has mis-represented the learned Magistrate for obtaining the impugned order of issuance of process. There are misleading statements in the complaint filed by the petitioner, who is a practicing Advocate.

9. Learned counsel for respondent no.2 further submits that a corporate entity is an artificial person, who acts through its officers, managing directors, chairman etc. If such a company commits 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 of conspiracy. However, at the same time, it is the cardinal principle of the criminal jurisprudence, that there is no vicarious liability unless the statute specifically provides so. When the Company is the offender, vicarious liability of the directors cannot be imputed automatically. Learned counsel submits that vicarious liability can be fastened only by reason of provisions of statute and not otherwise. So far as the Penal Code, 1860 is concerned, save and except in some matters, it 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 the statute, must be expressly stated. Learned counsel submits that merely because the respondent no.2 was the then chairman of respondent – BDA Company Ltd., he cannot be said to have committed offence, only because he is holding the said office.

10. Learned counsel for respondent no.2 submits that the order of the Chief Judicial Magistrate summoning the respondent no.2 does not reflect that he has applied his mind to the facts of the case and the law applicable thereto. The Chief Judicial Magistrate has not carefully scrutinized the evidence brought on record and mechanically passed the order of issuance of process. The learned Sessions Judge, in paragraph no.9 of the judgment, has rightly observed that the letter in question is sent on behalf of the accused no.1, by the Marketing Department and there is nothing on record to show that it is signed by present respondent no.2/original accused no.2.

11. Learned counsel for respondent no.2 submits that the dispute is of civil nature but the

petitioner, who is a practicing lawyer, with malafide intention and ulterior motive, has filed criminal complaint against respondent no.2, without making out the ingredients of the offences punishable under section 420, 427 r/w. 34 of the Indian Penal Code, as alleged in the complaint. The petitioner/original complainant did not qualify for the prize as per the terms and conditions of the scheme, set out by the Marketing Department of the respondent company. As communicated to him, the petitioner has not taken recourse to any civil remedy so far and only filed criminal complaint against the respondent company and its chairman, vice chairman and other officers with an ulterior motive. Learned counsel submits that the ingredients of cheating are not at all attracted in the present set of allegations. Respondent no.2 was not knowing the complainant prior to filing of the complaint and, therefore, it is difficult to accept that the respondent no.2 had any intention of causing any wrongful loss to the complainant and wrongful gain to anyone else. The petitioner/complainant, who is a practicing lawyer, has only alleged in the complaint that the respondent no.2 had a culpable intention right at the time of introducing the said scheme, however, except this allegation, there is nothing in the complaint, to substantiate those allegations.

12. Learned counsel for the respondent no.2 further submits that there were other purchasers, whose claim of Santro car under the scheme was rejected by the Marketing Official of the respondent – BDA Company Ltd. and being aggrieved with the same, some of the purchasers had lodged their complaints before the District Consumer Dispute Redressal Forum, Jalgaon. The District Consumer Dispute Redressal Forum, Jalgaon has directed the respondent – BDA Company Ltd. to give the respective prizes of such purchasers. Being aggrieved by the said order of the District Forum, the respondent-company had filed appeal before the State Consumer Dispute Redressal Commission, who after hearing both the parties, allowed the appeal and set aside the order passed by the District Forum. Being aggrieved by the same, one of the purchasers preferred an appeal before the National Consumer Dispute Redressal Forum, New Delhi and the said appeal came to be dismissed by order dated 11/2/2010. Learned counsel brought attention of this Court to Exhibit **“R-1”** annexed with the

affidavit-in-reply of the respondent no.2, wherein the photograph of Mr. Ganesh T. Survadkar, who won the Santro car and also list of the persons, who won the various other prizes like washing machine, motorbike, television and music system is annexed. Learned counsel submits that so far as respondent no.2 is concerned, although the allegations made in the complaint, even if given the face value and taken to be true in its entirety, do not disclose offence and it is found to be an abuse of the process of the Court. If no case is made out against respondent no.2, there is no point in saying that the respondent no.2 may avail the remedy of filing an application for discharge. Learned counsel submits that the learned Sessions Judge has considered the other grounds raised by the respondent no.2 alongwith the ground that the respondent no.2 was the whole time director of M/s. Herberston Ltd. and he could not have been the director of the present company. The learned Sessions Judge, by its impugned judgment and order has therefore rightly dismissed the complaint against the respondent no.2. No interference is required. Criminal Writ Petition is devoid of any merits and is thus liable to be dismissed.

13. Learned counsel for respondent no.2, in order to substantiate his submissions, places reliance in the following cases :

(i) Hira Lal Hari Lal Bhagwati Vs. CBI, New Delhi 2003 (5) S.C.C. 257;

(ii) G. Sagar Suri & Anr. V/s. State of U.P. & Ors. 2000 (2) S.C.C. 636;

(iii) Vir Prakash Sharma V/s Anil Kumar Agarwal & Anr. 2007 (7) S.C.C. 373;

(iv) Sunil Bharti Mittal Vs. Central Bureau of Investigation AIR 2015 SC 923;

(v) V.P. Shrivastava V/s. Indian Explosives Ltd. & Ors. (2010) 10 S.C.C. 361;

(vi) Dalip Kaur & Ors. V/s. Jagnar Singh & Anr. AIR 2009 S.C. 3191;

(vii) Mohammaed Ibrahim & Ors. V/s. State of Bihar and Anr. (2009) 8 S.C.C. 751;

(viii) Uma Shankar Gopalika V/s. State of Bihar and anr. (2005) 10 S.C.C. 336;

(ix) Anil Mahajan V/s. Bhor Industries Ltd. & Anr. (2005) 10 S.C.C. 228;

(x) Hari Prasad Chamaria V/s. Bishnu Kumar Surekha & Ors. (1973) 2 S.C.C. 823;

(xi) Dnyananda Sameer V/s. State of Maharashtra 2014(3) Bom.C.R. (Cri.) 87;

(xii) Pepsi Foods Limited & Anr. V/s. Special Judicial Magistrate 1998 (1) Mh.L.J. 599;

(xiii) G. Sagar Suri and Anr. V/s. State of U.P. and Ors. 2000 S.C.C. (Cri.) 513;

(xiv) Ashok Chaturvedi & Ors. V/s. Shitul H. Chanchani & Anr. (1998) 7 S.C.C. 698;

(xv) G.A. St. George V/s. Uma Dutt Sharma AIR 1939 All 602.

14. It appears from the record that the order passed by the learned Judicial Magistrate First Class dated 3/12/2008 in RCC No.249 of 2004, thereby issuing process against all the accused, came to be challenged by the respondent no.6 herein alone, by filing Criminal Revision Application No.17 of 2009. The learned Sessions Judge, Jalgaon, by judgment and order dated 21/12/2009 partly allowed the said Revision Application and further set aside the order of issuance of process in its entirety. The learned Sessions Judge has further directed the Magistrate to

hold enquiry into the matter in accordance with the provisions of section 202 of the Cr.P.C. and, thereafter, to proceed further with the matter in accordance with law. After considering the facts and circumstances and by consent of the parties, the learned Sessions Judge has directed that the complaint shall be dealt with by the Chief Judicial Magistrate himself. In view of the above directions, the learned Chief Judicial Magistrate proceeded to hold enquiry himself and directed the complainant to lead the evidence before the issuance of process, vide order dated 13/8/2010 passed below Exhibit 8. Accordingly, the complainant examined himself and one witness namely, Mohanlal Bharwani, the wine shop owner. The learned Chief Judicial Magistrate, by reasoned order dated 8/3/2011 issued the process against all the accused persons under section 420, 427 r/w. 34 of the Indian Penal Code. Against this order, the present respondent no.2 alone preferred Criminal Revision Application No.60 of 2011.

15. The learned Sessions Judge, by order dated 21/12/2009 passed in Criminal Revision Application No. 17 of 2009, set aside the order of issuance of process

passed by the Magistrate in its entirety and further gave certain directions including the direction to the Chief Judicial Magistrate, to deal with the case himself. In view of this, even though, the initial order passed by the Magistrate dated 3/12/2008 was not challenged by the present respondent no.2, the learned Sessions Judge has quashed and set aside the entire order of issuance of process passed by the Magistrate. The learned Chief Judicial Magistrate has undertaken a fresh enquiry as directed and accordingly passed a reasoned order of issuance of process. Thus, the Criminal Revision Application No. 60 of 2011 preferred by the respondent no.2 against the said order passed by the learned Chief Judicial Magistrate dated 8/3/2011, is maintainable. I do not find any substance in the submissions made by learned counsel for the petitioner, in this regard.

16. On careful perusal of the judgment and order passed by the learned Sessions Judge in Criminal Revision Application No. 60 of 2011, it appears that the present respondent no.2 has placed on record certain documents first time before the revisional Court. The learned Sessions Judge, in paragraph no.9

of the judgment has given reference to those documents particularly, certified copy of the extract from the Registrar of Companies, issued on 24/8/2005 in respect of a Company named and styled as M/s. Herberston Ltd. The learned Sessions Judge has observed that on perusal of the said extract, it appears that for the period of 21/12/1992 to 23/3/2005, the respondent no.2 herein was the whole time director of M/s Herberston Ltd. The learned Sessions Judge has observed that in such circumstances, if the respondent no.2 herein was the whole time director of the said company, he could not have been the director of the respondent – BDA Company Ltd.

17. It is well settled that at the stage of issuing process, the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he is only to be prima facie satisfied, as to whether there are sufficient grounds for proceeding against the accused. It is not the province of the Magistrate, to enter into the detail discussion of the merits or de-merits of the case nor can the High Court go into this matter in its revisional jurisdiction, which is very limited

one. The scope of enquiry under section 202 of the Code of Criminal Procedure is extremely limited i.e. only to the ascertainment of the truth or the falsity of the allegations made in the complaint - (i) on the basis of the material placed by the complainant; (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and (iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have. The correctness of the order whereby cognizance has been taken by the Magistrate unless it is perverse or based on no material, should be sparingly interferred with. Whatever defence the accused may have, can only be enquired into at the trial. There may be a situation, wherein the defences raised by the accused are factually unassailable and the same are not controvertible, it would demolish the foundation of the case raised by the prosecution. The Magistrate may examine such a defence even at the stage of taking cognizance and/or issuing process, however, the defences raised by the accused if factual in nature, it cannot be said that those defences are unassailable and also not controvertible.

18. Learned counsel for the petitioner has placed reliance in the following cases :

(i) **Vinod Raghuvanshi V. Ajay Arora and Ors. AIR 2014 SC (Supp) 1516;**

(ii) **Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi & Ors. AIR 1976 SC 1947 - 2014 ALL SCR (O.C.C.) 225;**

(iii) **Helios & Matheson Information Technology Ltd. & Others Vs. Rajeev Sawhney & Another [2012] 1 SCC 699;**

(iv) **Dr. Mrs. Nupur Talwar Vs. C.B.I. Delhi and anr. [2012] 2 ADJ (SC) 763;**

(v) **Nupur Talwar V. Central Bureau of Investigation and anr. AIR 2012 SC 1921;**

(vi) **State of Orissa Vs. Debendra Nath Padhi [2004] (8) Supreme 568;**

(vii) **Anil Saran Vs. State of Bihar and anr. AIR 1996 SC 204;**

(viii) **Nupur Talwar Vs. Central Bureau of Investigation & Anr. [2012] 4 Supreme 158.**

On careful perusal of the observations made by the learned Sessions Judge in paragraph no.9 of the impugned judgment and the ratio laid down in the above cited cases, it appears that the learned Sessions Judge has exceeded his limits and considered the probable defences of the accused (respondent no.2 herein), while exercising the revisional jurisdiction. The learned Sessions Judge has committed grave error while considering the documents first time produced in the revision. Though by referring certain extract, the respondent no.2 herein has raised certain defence, the same is factual in nature. It cannot be said that the said defence raised by the respondent no.2 herein is unassailable and also can not be controverted. The learned Sessions Judge should have avoided himself to enter into such factual controversy, based on certain assertions. Defence raised by the respondent no.2 herein before the Sessions Judge, is required to be established by acceptable and cogent evidence and thereupon, the same will have to be examined on merits. However, in paragraph no.9 of the impugned judgment, the learned Sessions Judge has also considered some other grounds. The learned Sessions

Judge has observed that except the allegations in the complaint that respondent no.2 herein signed the letter sent to the complainant for and on behalf of the accused no.1, there is nothing on record against the respondent no.2 herein. The learned Sessions Judge has further observed that if the said letter is perused, it appears that it is signed on behalf of the accused no.1, by the Marketing Department.

19. It has alleged in the complaint that the petitioner/complainant had addressed letter dated 1/3/2004 to the respondent no.2 herein. On perusal of the said letter dated 1/3/2004, which is annexed to the complaint, it appears that the petitioner/complainant had addressed the said letter to the General Manager (Marketing), BDA Company Ltd., Mumbai. It has also alleged in the complaint that the respondent no.2 herein had sent letter dated 19/2/2004 by post. However, on perusal of the said letter dated 19/2/2004, it appears that the said letter has been issued by the Marketing Department for BDA Company Ltd. and it was not written or signed by the respondent no.2 herein. Furthermore, on perusal of the letter dated 16/3/2014, it appears that the said

letter was issued by the Marketing Department of the respondent - BDA Company Ltd. addressed to the petitioner/complainant. On perusal of certain reminder letters issued by the petitioner/complainant, it appears that the said letters have been addressed to the General Manager, Marketing Department of the respondent – BDA Company Ltd. In absence of any prima facie evidence about the involvement of the respondent no.2 herein in the alleged crime, or any representation on his part in the entire process of managing of the scheme and the decision taken with regard to the winner in the said scheme, the question arises whether the respondent no.2 herein, being the chairman of the respondent - Company and in that capacity alone, is criminally liable?

20. In the case of **Sunil Bharti Mittal V/s. Central Bureau of Investigation** (cited supra), relied upon by learned counsel for respondent no.2, in paragraph nos.35 to 38 and paragraph no.39 (excluding case-laws discussed in the said paragraph), the Supreme Court has made the following observations :-

> 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 offendor, 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 Company Ltd. (supra) and S.K. Alagh (supra).”

The Supreme Court by referring various decisions on this point, observed that there is no concept of vicarious liability under the Penal law, unless the said statute covers the same within its ambit. Vicarious liability can be fastened only by reason of statute and not otherwise. It has also observed by the Supreme Court that the Penal Code, 1860, save and except in some matters, does not contemplate any vicarious liability on the part of a person.

21. In the instant case, even prima facie, the evidence is lacking about any role coupled with criminal intent on the part of the respondent no.2 herein.

22. It is settled law that for proving the offence of cheating, complainant is required to show that accused had fraudulent or dishonest intention at the time of making promise or representation and on failure to keep promise subsequently, such deceptive intention right at the beginning cannot be presumed.

23. Learned counsel for respondent no.2 submits that there are no allegations in the complaint indicating expressly or impliedly any intentional deception or fraudulent/dishonest intention on the part of the respondent no.2 herein from the time of inception of the said scheme. Learned counsel has

also submitted that respondent no.2 herein could not be attributed any mens rea for not declaring the petitioner/complainant as the winner under the said scheme launched by the respondent – BDA Company Ltd.

24. In the following cases, referred supra and relied upon by the learned counsel for respondent no.2, the applicability of section 420 of the Indian Penal Code is discussed and held that fraudulent/dishonest intention at the time of promise or representation, is necessary :-

(i) Hira Lal Hari Lal Bhagwati Vs. CBI, New Delhi 2003 (5) S.C.C. 257;

(ii) G. Sagar Suri & Anr. V/s. State of U.P. & Ors. 2000 (2) S.C.C. 636;

(iii) Vir Prakash Sharma V/s Anil Kumar Agarwal & Anr. 2007 (7) S.C.C. 373;

(iv) V.P. Shrivastava V/s. Indian Explosives Ltd. & Ors. (2010) 10 S.C.C. 361;

(v) Dalip Kaur & Ors. V/s Jagnar Singh & Anr. AIR 2009 S.C. 3191;

(vi) Uma Shankar Gopalika V/s State of Bihar and anr. (2005) 10 S.C.C. 336;

(vii) Anil Mahajan V/s. Bhor Industries Ltd. & Anr. (2005) 10 S.C.C. 228;

(viii) Hari Prasad Chamaria V/s. Bishnu Kumar Surekha & Ors. (1973) 2 S.C.C. 823;

(ix) G. Sagar Suri and Anr. V/s. State of U.P. and Ors. 2000 S.C.C. (Cri.) 513;

25. On careful perusal of the complaint and the allegations made therein, it appears that the petitioner/complainant, though was a practicing Advocate, without any direct involvement on the part of the respondent no.2 in the alleged process of managing of the scheme and the further decision regarding the winner of the said scheme, made allegations against the respondent no.2 herein. It further appears that the petitioner/complainant has impleaded respondent no.2 herein, as an accused no.2 only for the reason that he is the Chairman of the respondent – BDA Company Ltd. The allegations in the complaint are restricted to the extent of commission of the offences punishable under the Penal Code, 1860. It is well settled that the vicarious liability can be fastened only by reason of a statute and not otherwise. Respondent no.2 herein cannot be said to

have committed offence punishable under section 420 of the Indian Penal Code merely because he is the Chairman of the respondent – BDA Company Ltd. Section 420 of the Indian Penal Code does not contemplate any vicarious liability on the part of a person.

26. In **Pepsi Foods Ltd. Vs. Special Judicial Magistrate (1998) 5 SCC 749**, in paragraph no.28 of the judgment, the Supreme Court has made the following observations:-

> "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 scrutinize 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."

27. In the given set of allegations, whether the ingredients of section 420 of the I.P. Code stands attracted or not, it would not be appropriate to make any observations since the other accused persons are to face the trial, however, suffice to say that there are no sufficient grounds to proceed against the respondent no.2 herein. Though the learned Sessions Judge has considered certain documents produced for the first time in the revision pending before him, the learned Sessions Judge has also considered the other grounds and rightly passed the impugned order so far as the present respondent no.2 is concerned.

28. In view of the above discussion, no interference is required. Hence, the following order :-

ORDER

I) Criminal Writ Petition is hereby dismissed.

II) Rule stands discharged.

[V.K. JADHAV]
JUDGE

arp/