

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

% Decided on: 23rd February, 2017

+ CRL.M.C. 2760/2016 & & CrI.M.A. 11755/2016

BHARDWAJ THIRUVENKATA VENKATAVRAGHAVAN

..... Petitioner

Represented by: Ms. Rebecca M. John, Sr. Adv.
with Ms. Parul Kumar, Mr.
Shalin Arthwan, Mr. Nikhil
Ahuja, Adv.

versus

ASHOK ARORA

..... Respondent

Represented by: Ms. Pearl Bindra, Adv.

+ CRL.M.C. 4268/2016 & CrI.M.A. 17792/2016

BHARADWAJ THIRUVENKATA VENKATAVARAGHAVAN

..... Petitioner

Represented by: Ms. Rebecca M. John, Sr. Adv.
with Ms. Parul Kumar, Mr.
Shalin Arthwan, Mr. Nikhil
Ahuja, Adv.

versus

ASHOK ARORA

..... Respondent

Represented by: Ms. Pearl Bindra, Adv.

+ CRL.M.C. 4269/2016 & CrI.M.A. 17795/2016

BHARADWAJ THIRUVENKATA VENKATAVARAGHAVAN

..... Petitioner

Represented by: Ms. Rebecca M. John, Sr. Adv.
with Ms. Parul Kumar, Mr.
Shalin Arthwan, Mr. Nikhil
Ahuja, Adv.

versus

ASHOK ARORA

..... Respondent

Represented by: Ms. Pearl Bindra, Adv.

+ CRL.M.C. 4270/2016 & CrI.M.A. 17797/2016

BHARDWAJ THIRUVENKATA VENKATAVARAGHAVAN

..... Petitioner

Represented by: Ms. Rebecca M. John, Sr. Adv.
with Ms. Parul Kumar, Mr.
Shalin Arthwan, Mr. Nikhil
Ahuja, Adv.

versus

ASHOK ARORA

..... Respondent

Represented by: Ms. Pearl Bindra, Adv.

+ CRL.M.C. 4271/2016 & CrI.M.A. 17799/2016

BHARDWAJ THIRUVENKATA VENKATAVARAGHAVAN

..... Petitioner

Represented by: Ms. Rebecca M. John, Sr. Adv.
with Ms. Parul Kumar, Mr.
Shalin Arthwan, Mr. Nikhil
Ahuja, Adv.

versus

ASHOK ARORA

..... Respondent

Represented by: Ms. Pearl Bindra, Adv.

+ CRL.M.C. 4272/2016 & CrI.M.A. 17801/2016

BHARADWAJ THIRUVENKATA VENKATAVARAGHAVAN

..... Petitioner

Represented by: Ms. Rebecca M. John, Sr. Adv.
with Ms. Parul Kumar, Mr.

Shalin Arthwan, Mr. Nikhil
Ahuja, Advs.

versus

ASHOK ARORA

..... Respondent

Represented by: Ms. Pearl Bindra, Adv.

+ CRL.M.C. 4273/2016 & CrI.M.A. 17803/2016

BHARADWAJ THIRUVENKATA VENKATAVARAGHAVAN

..... Petitioner

Represented by: Ms. Rebecca M. John, Sr. Adv.
with Ms. Parul Kumar, Mr.
Shalin Arthwan, Mr. Nikhil
Ahuja, Advs.

versus

ASHOK ARORA

..... Respondent

Represented by: Ms. Pearl Bindra, Adv.

+ CRL.M.C. 4274/2016 & CrI.M.A. 17805/2016

BHARADWAJ THIRUVENKATA VENKATAVARAGHAVAN

..... Petitioner

Represented by: Ms. Rebecca M. John, Sr. Adv.
with Ms. Parul Kumar, Mr.
Shalin Arthwan, Mr. Nikhil
Ahuja, Advs.

versus

ASHOK ARORA

..... Respondent

Represented by: Ms. Pearl Bindra, Adv.

+ CRL.M.C. 4275/2016 & CrI.M.A. 17807/2016

BHARADWAJ THIRUVENKATA VENKATAVARAGHAVAN

..... Petitioner

Represented by: Ms. Rebecca M. John, Sr. Adv.
with Ms. Parul Kumar, Mr.
Shalin Arthwan, Mr. Nikhil
Ahuja, Adv.

versus

ASHOK ARORA Respondent
Represented by: Ms. Pearl Bindra, Adv.

+ CRL.M.C. 4276/2016 & CrI.M.A. 17809/2016

BHARADWAJ THIRUVENKATA VENKATAVARAGHAVAN
..... Petitioner
Represented by: Ms. Rebecca M. John, Sr. Adv.
with Ms. Parul Kumar, Mr.
Shalin Arthwan, Mr. Nikhil
Ahuja, Adv.

versus

ASHOK ARORA Respondent
Represented by: Ms. Pearl Bindra, Adv.

+ CRL.M.C. 4277/2016 & CrI.M.A. 17811/2016

BHARADWAJ THIRUVENKATA VENKATAVARAGHAVAN
..... Petitioner
Represented by: Ms. Rebecca M. John, Sr. Adv.
with Ms. Parul Kumar, Mr.
Shalin Arthwan, Mr. Nikhil
Ahuja, Adv.

versus

ASHOK ARORA Respondent
Represented by: Ms. Pearl Bindra, Adv.

+ CRL.M.C. 4278/2016 & CrI.M.A. 17813/2016

BHARDWAJ THIRUVENKATA VENKATAVARAGHAVAN

..... Petitioner
Represented by: Ms. Rebecca M. John, Sr. Adv.
with Ms. Parul Kumar, Mr.
Shalin Arthwan, Mr. Nikhil
Ahuja, Advs.

versus

ASHOK ARORA Respondent
Represented by: Ms. Pearl Bindra, Adv.

+ CRL.M.C. 4279/2016 & CrI.M.A. 17815/2016

BHARADWAJ THIRUVENKATA VENKATAVARAGHAVAN
..... Petitioner
Represented by: Ms. Rebecca M. John, Sr. Adv.
with Ms. Parul Kumar, Mr.
Shalin Arthwan, Mr. Nikhil
Ahuja, Advs.

versus

ASHOK ARORA Respondent
Represented by: Ms. Pearl Bindra, Adv.

+ CRL.M.C. 4280/2016 & CrI.M.A. 17817/2016

BHARDWAJ THIRUVENKATA VENKATAVARAGHAVAN
..... Petitioner
Represented by: Ms. Rebecca M. John, Sr. Adv.
with Ms. Parul Kumar, Mr.
Shalin Arthwan, Mr. Nikhil
Ahuja, Advs.

versus

ASHOK ARORA Respondent
Represented by: Ms. Pearl Bindra, Adv.

+ CRL.M.C. 3252/2016 & CrI.M.A. 13897/2016

BHARDWAJ THIRUVENKATA VENKATARAVRAGHAVAN
..... Petitioner
Represented by: Mr. S. Bajaj, Ms. Parul Kumar,
Mr. Shalin Arthwan, Adv.
versus
RAJA ARORA
..... Respondent
Represented by: Ms. Pearl Bindra, Adv.

+ CRL.M.C. 3279/2016 & & Crl.M.A. 13972/2016

BHARADWAJ THIRUVENKATA VENKATAVARAGHAVAN
..... Petitioner
Represented by: Mr. S. Bajaj, Ms. Parul Kumar,
Mr. Shalin Arthwan, Adv.
versus
RAJA ARORA
..... Respondent
Represented by: Ms. Pearl Bindra, Adv.

+ CRL.M.C. 3280/2016 & & Crl.M.A. 13974/2016

BHARADWAJ THIRUVENKATA VENKATAVARAGHAVAN
..... Petitioner
Represented by: Mr. S. Bajaj, Ms. Parul Kumar,
Mr. Shalin Arthwan, Adv.
versus
RAJA ARORA
..... Respondent
Represented by: Ms. Pearl Bindra, Adv.

+ CRL.M.C. 3281/2016 & Crl.M.A. 13976/2016

BHARADWAJ THIRUVENKATA VENKATAVARAGHAVAN
..... Petitioner
Represented by: Mr. S. Bajaj, Ms. Parul Kumar,
Mr. Shalin Arthwan, Adv.
versus
RAJA ARORA
..... Respondent
Represented by: Ms. Pearl Bindra, Adv.

+ CRL.M.C. 3282/2016 7 & CrI.M.A. 13978/2016

BHARADWAJ THIRUVENKATA VENKATAVARAGHAVAN
..... Petitioner
Represented by: Mr. S. Bajaj, Ms. Parul Kumar,
Mr. Shalin Arthwan, Advs.
versus
RAJA ARORA
..... Respondent
Represented by: Ms. Pearl Bindra, Adv.

+ CRL.M.C. 3283/2016 & CrI.M.A. 13980/2016

BHARADWAJ THIRUVENKATA VENKATAVARAGHAVAN
..... Petitioner
Represented by: Mr. S. Bajaj, Ms. Parul Kumar,
Mr. Shalin Arthwan, Advs.
versus
RAJA ARORA
..... Respondent
Represented by: Ms. Pearl Bindra, Adv.

+ CRL.M.C. 3284/2016 & CrI.M.A.13982 /2016

BHARADWAJ THIRUVENKATA VENKATRAVARAGHAVAN
..... Petitioner
Represented by: Mr. S. Bajaj, Ms. Parul Kumar,
Mr. Shalin Arthwan, Advs.
versus
RAJA ARORA
..... Respondent
Represented by: Ms. Pearl Bindra, Adv.

+ CRL.M.C. 3285/2016 & CrI.M.A.13984 /2016

BHARADWAJ THIRUVENKATA VENKATAVARAGHAVAN
..... Petitioner
Represented by: Mr. S. Bajaj, Ms. Parul Kumar,
Mr. Shalin Arthwan, Advs.
versus
RAJA ARORA
..... Respondent

Represented by: Ms. Pearl Bindra, Adv.

+ CRL.M.C. 3286/2016 & CrI.M.A. 13986/2016

BHARADWAJ THIRUVENKATA VENKATARAVARAGHAVAN
..... Petitioner

Represented by: Mr. S. Bajaj, Ms. Parul Kumar,
Mr. Shalin Arthwan, Adv.

versus

RAJA ARORA Respondent

Represented by: Ms. Pearl Bindra, Adv.

+ CRL.M.C. 3287/2016 & CrI.M.A. 13988/2016

BHARADWAJ THIRUVENKATA VENKATAVARAGHAVAN
..... Petitioner

Represented by: Mr. S. Bajaj, Ms. Parul Kumar,
Mr. Shalin Arthwan, Adv.

versus

RAJA ARORA Respondent

Represented by: Ms. Pearl Bindra, Adv.

+ CRL.M.C. 3288/2016 & CrI.M.A. 13990/2016

BHARADWAJ THIRUVENKATA VENKATAVARAGHAVAN
..... Petitioner

Represented by: Mr. S. Bajaj, Ms. Parul Kumar,
Mr. Shalin Arthwan, Adv.

versus

RAJA ARORA Respondent

Represented by: Ms. Pearl Bindra, Adv.

+ CRL.M.C. 3289/2016 & CrI.M.A. 13992/2016

BHARADWAJ THIRUVENKATA VENKATRAVARAGHAVAN
..... Petitioner

Represented by: Mr. S. Bajaj, Ms. Parul Kumar,
Mr. Shalin Arthwan, Adv.

versus

RAJA ARORA

..... Respondent

Represented by: Ms. Pearl Bindra, Adv.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. Petitioner by way of Crl.M.C.Nos. 3252/20016, 3279/2016, 3280/2016, 3281/2016, 3282/2016, 3283/2016, 3284/2016, 3285/2016, 3286/2016, 3287/2016, 3288/2016 and 3289/2016 challenges the order dated 9th May, 2016 summoning him for offence punishable under Sections 138 read with 142 of the Negotiable Instruments Act (in short the NI Act) in Criminal Complaint cases Nos. 6/1/16, 8/1/16, 18/1/16, 19/1/16, 7/1/16, 9/1/16, 12/1/16, 13/1/16, 11/1/16, 17/1/16, 16/1/16, 15/1/16 and seeks quashing of complaints as well. By way of Crl.M.C.Nos. 2760/2016, 4268/2016, 4269/2016, 4270/2016, 4271/2016, 4272/2016, 4273/2016, 4274/2016, 4275/2016, 4276/2016, 4277/2016, 4278/2016, 4279/2016 and 4280/2016 the petitioner challenges the order dated 30th March, 2016 summoning him for offence punishable under Sections 138 read with 142 of the NI Act in Criminal Complaint cases Nos. 32/1/16, 36/1/16, 28/1/16, 26/1/16, 25/1/16, 30/1/16, 27/1/16, 34/1/16, 29/1/16, 31/1/16, 35/1/16, 33/1/16, 24/1/16, 23/1/16 and seeks quashing of complaints as well.

2. Complaints as noted above were filed by two respondents (separately) Raja Arora and Ashok Arora against M/s. Vasan Health Care Private Limited (in short Vasan Health Care) and its Directors alleging that the complainants were the joint owners of the various built up properties which were leased out to Vasan Health Care. The terms of the lease deed between

the complainant and the accused persons inter alia fixed monthly rents and a security deposit. The accused in the complaint i.e. Vasan Health Care and its Directors issued cheques towards part-payment of the monthly rents. However, when the cheques were presented, the same were dishonoured for the reason 'payment stopped by drawer'. On the assurance of the accused persons, the cheques were represented, however they were again returned unpaid with remarks 'payment stopped by drawer'. Legal demand notices were issued to which replies were sent. Since despite expiry of the period of 15 days after the receipt of notice, the amount was not paid, the respondents filed the complaints as noted above.

3. The two-fold contentions of learned counsel for the petitioner are that the petitioner is the independent non-executive nominee director and thus cannot be fastened with the vicarious liability to pay the dues of the company, and that the petitioner resigned from the company on 18th November, 2015 before the cause of action accrued i.e. payment was not made despite service of legal demand notice. Hence the complaints and the impugned order summoning him are liable to be quashed qua the petitioner.

4. In the reply affidavits filed, the respondent does not dispute that the petitioner is the non-executive nominee independent director. Contention of learned counsel for the respondent is that the petitioner is the Director of Sequoia India Investment Holding which finances Vasan Health Care, hence is a nominee director of Vasan Health Care. Since he is responsible for the finances of the company he is vicariously liable.

5. The vicarious liability in case of a company or firm under Section 141, NI Act would arise if a person is in charge and responsible for the conduct of the business of the company or the firm. The Hon'ble Supreme Court

in S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla, (2005) 8 SCC 89, held as under:

“10. While analysing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is committed by a company. The key words which occur in the section are ‘every person’. These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words—

‘Who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence, etc’

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.

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 spelt 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."

6. Further in K.K. Ahuja v. V.K. Vora (2009) 10 SCC 48 Supreme Court summarizing the legal position qua the vicarious liability of the officers of a company held:

"27. The position under Section 141 of the Negotiable Instruments Act, 1881 can be summarized 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 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). 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, be 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.”*

7. The Petitioner, Bhardwaj Thiruvengkata Venkatavaraghavan was appointed as an Independent Non executive nominee director on 18th December, 2009 as per Form 32 filed by the Company before the Registrar of Companies (ROC). He ceased to be a director of the Vasan Heath Care with effect from 18th November, 2015 as per the Form DIR-12.

8. The Reserve Bank of India vide its Master Circular No RBI/2012-13/43 dated 2nd July, 2012 on 'Wilful Defaulters' issued directions with respect to the reporting of names of Directors and the position regarding Independent and Nominee Directors. Relevant Paras 5.1 and 5.2 of the Circular read as under:

"5.1 Need for Ensuring Accuracy RBI/Credit Information Companies disseminate information on non-suit filed and suit filed accounts respectively, as reported to them by the banks/FIs and responsibility for reporting correct information and also accuracy of facts and figures rests with the concerned banks and financial institutions. Therefore, banks and financial institutions should take immediate steps to update their records and ensure that the names of current directors are reported. In addition to reporting the names of current directors, it is necessary to furnish information about directors who were associated with the company at the time the account was classified as defaulter, to put the other banks and financial institutions on guard. Banks and FIs may also ensure the facts

about directors, wherever possible, by cross-checking with Registrar of Companies.

5.2. Position regarding Independent and Nominee directors Professional Directors who associate with companies for their expert knowledge act as independent directors. Such independent directors apart from receiving director's remuneration do not have any material pecuniary relationship or transactions with the company, its promoters, its management or its subsidiaries, which in the judgment of Board may affect their independent judgment. As a guiding principle of disclosure, no material fact should be suppressed while disclosing the names of a company that is a defaulter and the names of all directors should be published. However, while doing so, a suitable distinguishing remark should be made clarifying that the concerned person was an independent director. Similarly the names of directors who are nominees of government or financial institutions should also be reported but a suitable remark 'nominee director' should be incorporated. Therefore, against the names of Independent Directors and Nominee Directors, they should indicate the abbreviations "Ind." and "Nom" respectively in brackets to distinguish them from other directors."

9. 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 10066; (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.”

10. 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.

11. 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.”*

12. A Nominee Director has been defined under the Explanation to sub-section (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.”

13. 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.”

14. 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.

15. Merely because the petitioner is the Director of Sequoia India Investment Holding which finances Vasana Health Care and by virtue thereof is a nominee independent director of Vasana Health Care, he cannot be held to be responsible for the day-to-day affairs of Vasana 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 Vasana Health Care nor the signatory to the cheque. He is also not the person responsible for day-to-day functioning of Vasana Health Care. No vicarious liability can be fastened on the petitioner in the absence of specific role being attributed to the petitioner.

16. In view of the legal position noted above, the petitions are allowed. The impugned orders to the extent issuing summons to the petitioner in the Complaint Cases No. 32/1/16, 36/1/16, 28/1/16, 26/1/16, 25/1/16, 30/1/16, 27/1/16, 34/1/16, 29/1/16, 31/1/16, 35/1/16, 33/1/16, 24/1/16, 23/1/16, 6/1/16, 8/1/16, 18/1/16, 19/1/16, 7/1/16, 9/1/16, 12/1/16, 13/1/16, 11/1/16, 17/1/16, 16/1/16 and 15/1/16 are quashed.

17. Petitions and applications are disposed of.

(MUKTA GUPTA)
JUDGE

FEBRUARY 23, 2017
‘ga’