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

Reserved on: 3rd October, 2018
Pronounced on: 19th November, 2018

\+ **CRL.M.C. 1873/2015 & CRL.M.A. 6732/2015**

S.N. SUBRAHMANYAM ..... Petitioner

Through: Mr. Vikas Pahwa, Sr. Advocate with Ms. Sima Gulati, Mr. Subhash Gulati, Mr.Shailesh Poddar, Mr. Vinit Arora & Mr. Sumit Saini, Advocates.

versus

STATE ..... Respondent

Through: Mr. Mukesh Kumar, APP.

\+ **CRL.M.C. 2064/2015**

DLF UNIVERSAL LTD. THR. ITS AUTHORIZED REPRESENTTIVE ..... Petitioner

Through: Mr. Ramesh Gupta, Sr. Advocate with Mr. Sandeep Kapur, Mr. Vivek Suri, Mr. Karan Seth & Mr. Mayank Datta, Advs.

versus

STATE NCT OF DELHI THR. FACTORY INSPECTOR ..... Respondent

Through: Mr. Mukesh Kumar, APP.

\+ **CRL.M.C. 2066/2015**

RAJEEV TALWAR ..... Petitioner

Through: Mr. Sidharth Luthra, Sr. Advocate with Mr. Sandeep Kapur, Mr. Vivek Suri, Mr. Karn Seth, Mr. Mayank

Datta & Mr. Aashneet Singh,
Advocates.

versus

STATE NCT OF DELHI ..... Respondent

Through: Mr. Mukesh Kumar, APP.

+ **CRL.M.C. 2067/2015**

MOHIT GUJRAL ..... Petitioner

Through: Mr. Ramesh Gupta, Sr. Advocate with Mr. Sandeep Kapur, Mr. Vivek Suri, Mr. Karan Seth & Mr. Mayank Datta, Advs.

versus

STATE NCT OF DELHI THR. FACTORY INSPECTOR ..... Respondent

Through: Mr. Mukesh Kumar, APP.

+ **CRL.M.C. 2068/2015 & CRL.M.A. 7363/2015**

K VENKATARAMANAN ..... Petitioner

Through: Mr. Dayankrishnan, Sr. Advocate with Mr. Mahesh Agarwal, Mr. Anuj Malhotra & Mr. Anirudh Bhat, Advocates.

versus

STATE ..... Respondent

Through: Mr. Mukesh Kumar, APP.

+ **CRL.M.C. 2069/2015 & CRL.M.A. 7366/2015**

A M NAIK ..... Petitioner

Through: Mr. Kapil Sibbal & Mr. Dayankrishnan, Sr. Advocates with Mr. Mahesh Agarwal, Mr. Anuj Malhotra & Mr. Anirudh Bhat, Advocates.

versus

STATE & ORS. ..... Respondents

Through: Mr. Mukesh Kumar, APP.

+ **CRL.M.C. 2070/2015 & CRL.M.A. 7369/2015**

M V KOTWAL ..... Petitioner

Through: Mr. Dayankrishnan, Sr. Advocate with Mr. Mahesh Agarwal, Mr. Anuj Malhotra & Mr. Anirudh Bhat, Advocates.

versus

STATE & ORS. ..... Respondents

Through: Mr. Mukesh Kumar, APP.

+ **CRL.M.C. 2071/2015 & CRL.M.A. 7373/2015**

SHAILENDRA ROY ..... Petitioner

Through: Ms. Sima Gulati with Mr. Subhash Gulati, Mr. Shailesh Poddar & Mr. Sumit Saini, Advocates.

versus

STATE ..... Respondent

Through: Mr. Mukesh Kumar, APP.

+ **CRL.M.C. 2072/2015 & CRL.M.A. 7375/2015**

R. SHANKAR RAMAN ..... Petitioner

Through: Ms. Sima Gulati with Mr. Subhash Gulati, Mr. Shailesh Poddar & Mr. Sumit Saini, Advocates.

versus

STATE ..... Respondent

Through: Mr. Mukesh Kumar, APP.

+ **CRL.M.C. 2158/2015 & CRL.M.A. 7635/2015**

SUDHIR SAHGAL ..... Petitioner

Through: Mr. R.K. Handoo with Mr. Sandeep Kapur, Mr. Vivek Suri, Mr. Mayank Datta, Mr. Karan Seth & Mr. Aashneet Singh, Advocates.

versus

STATE NCT OF DELHI ..... Respondent

Through: Mr. Mukesh Kumar, APP.

\+ **CRL.M.C. 2159/2015 & CRL.M.A. 7672/2015**

ASHOK KUMAR TYAGI ..... Petitioner

Through: Mr. Sidharth Luthra, Sr. Advocate with Mr. Sandeep Kapur, Mr. Vivek Suri, Mr. Karn Seth, Mr. Mayank Datta & Mr. Aashneet Singh, Advocates.

versus

STATE NCT OF DELHI ..... Respondent

Through: Mr. Mukesh Kumar, APP.

\+ **CRL.M.C. 2160/2015 & CRL.M.A. 7637/2015**

SHRIRAM KHATTAR ..... Petitioner

Through: Mr. R.K. Handoo with Mr. Sandeep Kapur, Mr. Vivek Suri, Mr. Mayank Datta, Mr. Karan Seth & Mr. Aashneet Singh, Advocates.

Versus

STATE NCT OF DELHI ..... Respondent

Through: Mr. Mukesh Kumar, APP.

CORAM:
HON'BLE MR. JUSTICE R.K.GAUBA

<u>J U D G M E N T</u>

1. The work of development of DLF Capital Green Project at a construction site described as 15, Shivaji Marg, Delhi-110 015 owned by DLF Universal Limited ("the land owner company") was underway in May, 2014, the contract for said construction work having been entrusted by the said land owner company to M/s. Larsen and Toubro Limited ("the construction contractor company"). On 17.05.2014, at about 3:50 p.m. a worker named Ankit Kumar, engaged as a painter at the level of 18th floor of Tower No.14, while applying paint on the face of the exterior wall, fell down to the ground suffering serious injuries that resulted in his death.

2. The matter was reported, *inter alia,* to the Station House Officer of Police Station Moti Nagar who registered first information report (FIR) No.429/2014 and took up the investigation into offences suspected to have been committed, they being punishable under Section 288 (negligent conduct with respect to pulling down or repairing building) and Section 304-A (causing death by negligence) of Indian Penal Code, 1860 (IPC). The investigation into the said FIR resulted in report under Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C.) being submitted to seek prosecution of one Shahzad son of Abdul Gani on the accusations of his complicity in the said offences under Sections 288/304-A IPC for the reasons that he was the supervisor engaged by the sub-contractor Anwar Ahmad, to whom the work in question had been allocated by the construction contractor company, the death being attributable to acts of commission or omission on his part.

3. Simultaneous to the aforesaid report to the police and initiation of action by it *vis-à-vis* the aforementioned cognizable offences, the mater was also brought to the notice of the authorities in the office of labour commissioner, Govt. of National Capital Territory of Delhi, particularly the Inspector of Building and Construction. The inquiries made by the said authorities culminated in a criminal complaint (CC No.55F1/14) being presented in the court of Metropolitan Magistrate on 10.07.2014 by the Inspector of Building and Construction (also Deputy Chief Inspector of Factories), the complaint alleging offence punishable under Section 47 of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 ("the Building and Construction Workers Act", for short). The Metropolitan Magistrate took cognizance by order dated 10.09.2014 and issued summons on the said complaint, *inter alia,* against the petitioners who have approached this court invoking inherent jurisdiction under Section 482 Cr.P.C. by the captioned petitions seeking the proceedings arising out of the said criminal complaint case to be quashed on the ground the same is in the nature of abuse of the process of the court.

4. It may be mentioned here that the criminal complaint in which summoning order was passed which is impugned here, fifteen (15) persons were shown in the fray as accused, they including the land owner company and the construction contractor company, five of the accused persons being associated with the land owner company while eight others connected to the construction contractor company.

5. Though it was pointed out that in the impugned order dated 10.09.2014 whereby the petitioners have been summoned by the Metropolitan Magistrate, there is a reference to Section 179 of the Factories Act which was wholly uncalled for, the learned counsel for the petitioners fairly submitted that it having been well-understood by all concerned that the summoning order is for the offence under Section 47 of the Building and Construction Workers Act on account of breach of the rules framed thereunder, they press these petitions for quashing of the said summoning order on merits on the grounds indicated hereafter.

6. The petitions of the land owner company (petitioner in Crl.M.C.2064/2015), its Chairman Mohit Gujral (petitioner in Crl.M.C.2067/2015), its Managing Director, Rajeev Talwar (petitioner in Crl.M.C.2066/2015) and its Directors Shriram Khattar, Ashok Kumar Tyagi and Sudhir Sahgal (petitioners in Crl.M.C.2160/2015, 2159/2015 and 2158/2015 respectively) primarily contend that the construction contract having been entrusted to the said other company, the work being carried out under the supervision and control of the latter through its sub-contractor, it having no connection whatsoever with the day-to-day activity, it had no role to play or nexus with any of the acts of commission or omission on the basis of which accusations have been leveled, no case also being made out of vicarious liability under the criminal law.

7. Neither the construction contractor company nor two of the other accused connected thereto – Mr. Daljit Singh and Mr. Harish

Vaid – described as Project Director and Manager (Industrial Relations) respectively in-charge of the construction site, have come up to this court with any plea assailing the order of the Metropolitan Magistrate taking cognizance of the afore-mentioned offence or summoning each of them. Six (6) others, connected to the said construction contractor company, however, are before this court, with similar petitions under Section 482 Cr.P.C. as aforesaid, they being A.M. Naik, Group Executive Chairman (petitioner in Crl.M.C.2069/2015); K. Venkataramanan, CEO and MD (petitioner in Crl.M.C.2068/2015); M.V. Kotwal, whole-time Director and President (Heavy Engineering) (petitioner in Crl.M.C.2070/2015); S.N. Subrahmanyam, whole-time Director and Senior Executive Vice President (Infrastructure and Construction) (petitioner in Crl.M.C.1873/2015); R. Shankar Raman, whole-time Director & CFO (petitioner in Crl.M.C.2072/2015); and Shailender Rao, whole-time Director and Senior Executive Vice President (Corporate Affairs and Power) (petitioner in Crl.M.C.2071/2015). The thrust of the arguments of this set of petitioners is that given their position in the hierarchy in the construction contractor company, having regard to the measures that had been put in position under their directions, in strict compliance of and adherence to the law, the work in question having been entrusted to a sub-contractor, their representative being in-charge of the project at site, they cannot be held accountable under the principle of vicarious liability for the penal offence under the special law which has been invoked by the prosecution before the

Metropolitan Magistrate, and in which they have been summoned such proceedings being abuse of the law.

8. The petitions have been resisted by the respondent State (the complainant). Since they have arisen out of the same case and bring a challenge to the same order, they have been heard together. During the course of hearing, references were made to certain communications that had been exchanged between the companies (accused) on one hand and the statutory authorities on the other. For clarity, the complainant was directed by order dated 24.09.2018 to file an affidavit explaining its position, *vis-à-vis* the said documents and in compliance a reply dated 28.09.2018 styled as reply affidavit to the supplementary documents was brought on record by the respondents on 29.09.2018.

9. The Building and Construction Workers Act was brought on the statute book enforced *w.e.f.* 01.03.1996 with the objective of regulating the employment and conditions of service of building and other construction workers and to provide for their safety, health and welfare measures and for other matters connected therewith or incidental thereto.

10. The expression *"building or other construction work"* is defined by Section 2(1)(d) to mean, *inter alia, "the construction, alteration, repairs, maintenance or demolition, of or, in relation to, buildings…".* There is no dispute that the works being carried out at the site in question in the name and style of DLF Capital Greens Project, in the course of which the fatal accident occurred, were

"building or other construction work" within the meaning of the statute. The *"building worker"* is defined by Section 2(1)(e) to mean *"a person who is employed to do any skilled, semiskilled or unskilled manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be expressed or implied, in connection with any building or other construction work"*. There is no dispute that Ankit Kumar, whose death due to fall on 17.05.2014 has led to the criminal action was engaged as a *"building worker"* at the project site in question within the meaning of the said expression.

11. The meaning and import of three other expressions – *"contractor"*, *"employer"*, and *"establishment"* being germane to the issues that have been raised, their definitions, as appearing in clauses (g), (i) and (j) of Section 2(1) of the Building and Construction Workers Act, may be taken note of as under:-

> *"(g) "contractor" means a person who undertakes to produce a given result for any establishment, other than a mere supply of goods or articles of manufacture, by the employment of building workers or who supplies building workers for any work of the establishment; and includes a sub-contractor;*
>
> *(i) "employer", in relation to an establishment, means the owner thereof, and includes,-*
>
>> *(i) in relation to a building or other construction work carried on by or under the authority of any department of the Government, directly without any contractor, the authority specified in this behalf, or where no authority is specified, the head of the department;*

(ii) in relation to a building or other construction work carried on by or on behalf of a local authority or other establishment, directly without any contractor, the chief executive officer of that authority or establishment;

(iii) in relation to a building or other construction work carried on by or though a contractor, or by the employment of building workers supplied by a contractor, the contractor;

(j) "establishment" means any establishment belonging to, or under the control of, Government, any body corporate or firm, an individual or association or other body of individuals which or who employs building workers in any building or other construction work; and includes an establishment belonging to a contractor, but does not include an individual who employs such workers in any building or construction work in relation to his own residence the total cost of such construction not being more than rupees ten lakh;"

(emphasis supplied)

12. It is clear from the above-noted definitions that the "contractor" in relation to a building or other construction work may be a person other than owner of the subject property at whose instance such work is undertaken. As would be seen with reference to certain other provisions of the law, the responsibility for the safety measures is of the person who falls within the description "employer", qua the building worker. It is the "employer" who constitutes the "establishment" which is duty bound, under the law and the rules framed thereunder, to put in position, the requisite safety measures.

13. It would be of advantage to bear in mind the broad scheme of law in force by the Building and Construction Workers Act. Besides conceiving of certain statutory authorities including advisory or expert committees (Chapter II), welfare boards (Chapter V), enforcement officers (described as Inspecting Staff) (chapter VIII), it mandates compulsory registration of establishments (Chapter III) as also building workers as beneficiaries (Chapter IV). It confers certain role upon authorities in the government, the *"appropriate government"* as per section 2(i)(iii) in relation to such establishment as *"employs building workers either directly or through a contractor"* being the government of the State in which such establishment is situate.

14. The sixth chapter (*"conditions of service of building workers"*) deals with subjects such as fixed hours for normal working day (Section 28), wages for overtime work (Section 29), maintenance of registers and records (Section 30), prohibition of employment of certain persons in certain building or other construction work (Section 31), drinking water (Section 32), latrines and urinals (Section 33), accommodation (Section 34), Creches (Section 35), First-aid (Section 36), Canteens, etc. (Section 37).

15. The seventh chapter (*"safety and health measures")* is what is crucial to the present case. It confers, by Section 40, power on the appropriate government to make rules for the safety and health of building workers, the rules envisaged whereby do also cover, per sub-Section (2) the following:-

"(a) the safe means of access to, and the safety of, any working place, including the provision of suitable and sufficient scaffolding at various stages when work cannot be safely done from the ground or from any part of a building or from a ladder or such other means of support;

(e) the erection, installation, use and maintenance of hoists, lifting appliances and lifting gear including periodical testing and examination and heat treatment where necessary, precautions to be taken while raising or lowering loads, restrictions on carriage of persons and appointment of competent persons on hoists or other lifting appliances;

(o) the keeping of safety nets, safety sheets and safety belts where the special nature or the circumstances of work render them necessary for the safety of the workers;

(p) the standards to be complied with regard to scaffolding, ladders and stairs, lifting appliances. ropes, chains and accessories, earth moving equipments and floating operational equipments;

(r) the safety policy, that is to say, a policy relating to steps to be taken to ensure the safety and health of the building workers, the administrative arrangements therefor and the matters connected therewith, to be framed by the employers and contractors for the operations to be carried on in a building or other construction work:

(u) any other matter concerning the safety and health of workers working in any of the operations being carried on in a building or other construction work."

(emphasis supplied)

16. This power to make rules specific to the subject of *"rules for safety and health of building workers"* is to be read with the general provision contained in Section 62 (*power to make rules*) vested in the

appropriate government. Section 41 similarly entrusts the responsibility of framing of model rules for safety measures unto the central government.

17. There are two specific provisions of the Building and Construction Workers Act as spell out *"responsibility of the employer" vis-à-vis* the statutory command for *"safety and health measures"* to be put in position. They read thus:-

> *"38. Safety Committee and safety officers.- (1) In every establishment wherein five hundred or more building workers are ordinarily employed, the employer shall constitute a Safety Committee consisting of such number of representatives of the employer and the building workers as may be prescribed by the State Government:*
>
> *Provided that the number of persons representing the workers, shall, in no case, be less than the persons representing the employer.*
>
> *(2) In every establishment referred to in sub-section (1), the employer shall also appoint a safety officer who shall possess such qualifications and perform such duties as may be prescribed.*
>
> *44. Responsibility of employers.- An employer shall be responsible for providing constant and adequate supervision of any building or other construction work in his establishment as to ensure compliance with the provisions of this Act relating to safety and for taking all practical steps necessary to prevent accidents."*
>
> (emphasis supplied)

18. The above-noted statutory provisions declare unequivocally that it is the "employer" *vis-à-vis* a building or other construction project who is "responsible" for arranging all the prescribed safety measures

and for due compliances to be ensured, the same inclusive of a "safety committee" and a "safety officer". Having regard to the scheme of the statute, a "contractor" having undertaken to carry out the construction work for and on behalf of the land owner, and also being the person who "employs building workers" in such work, also takes on the responsibility towards safety and health measures from the latter.

19. For completion of narration, it may be added that Section 39 casts a duty on *"the employer"* to give notice, in the manner prescribed, to the specified authority in the event of an accident occurring in its establishment, it resulting in death or bodily injury incapacitating a worker for a certain period, this for the purpose of investigation or inquiry by such authority as may be deemed necessary. In the present case, the notice of the accident was concededly given and the inquiry held by the concerned statutory inspectorate.

20. The Building and Construction Workers Act also requires a prior notice of commencement of building or construction work to be given, the mandatory information requisite for such purposes being as indicated in the following provision:-

> *"46. Notice of commencement of building or other construction work.-*
>
> *(1) <u>An employer shall,</u> at least thirty days <u>before the commencement of any building or other construction work, send</u> or cause to be sent <u>to the Inspector</u> having jurisdiction in the area where the proposed building or*

other construction work is to be executed, <u>a written notice containing</u>-

(a) the name and situation of the place where the building or other construction work is proposed to be carried on;

(b) the name and address of the person who is undertaking the building or other construction work;

(c) the address to which communications relating to the building or other construction work may be sent;

(d) the nature of the work involved and the facilities, including any plant and machinery, provided;

(e) the arrangements for the storage of explosives, if any, to be used in the building or other construction work;

(f) the number of workers likely to be employed during the various stages of building or other construction work;

(g) <u>the name and designation of the person who will be in overall charge of the building or other construction work at the site</u>;

(h) the approximate duration of the work;

(i) such other matters as may be prescribed.

(2) Where any change occurs in any of the particulars furnished under sub-section (1), the employer shall intimate the change to the Inspector within two days of such change.

(3) Nothing contained in sub-section (1) shall apply in case of such class of building or other construction work as the appropriate Government may by notification specify to be emergent works."

(emphasis supplied)

21. The above-quoted provision only re-inforces the conclusion that the responsibility towards due compliances with health and safety measures prescribed by the law and rules framed thereunder is primarily of the "employer", a person engaged as "a contractor" for carrying out the construction work, also vested with the authority to employ building workers being the "employer". The person deputed as "one in overall charge" is the representative of "the employer", the employer being answerable and accountable for all acts of commission or omission done by such representative "incharge of the project" or those working under his control. Pertinent to add, the duty to intimate, in advance, commencement of the construction work (by prescribed notice) is not of the land owner but of the "employer", such statutory notice requiring it to be specified, amongst others, the particulars of the person who would be accountable in the capacity of he being "in overall charge".

22. In exercise of the powers conferred upon the said authority in exercise of the powers conferred by the Building and Construction Workers Act, the lieutenant governor of the Govt. of NCT of Delhi made and notified Rules which are called the Delhi Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Rules 2002 (*"The Delhi Rules",* for short).

23. The criminal complaint (from which the present proceedings arise) refers specifically to breach of rules 39 (Health and safety policy), rule 42 (Slipping, tripping, cutting, drowning and falling hazards), rule 178 (Safety belt and its use), rule 179 (Safety net and its

use), rule 196 (Guardrails) and rule 209 (Safety officer) of the Delhi Rules. All these Rules fall in different Chapters of third part (Safety and Health).

24. Rules 39 and 42 appear in the sixth chapter (general provisions), rules 178 and 179 in sixteenth chapter (Catch Platform and Hoardings, Chutes, Safety Belts and Nets), rule 196 included in nineteenth chapter (Scaffold), while rule 209 forms part of the provisions of twenty-first chapter (Safety Organization).

25. The offence to answer which the petitioners, and three others, have been summoned by the Metropolitan Magistrate is defined and provided for in Section 47 of the Building and Construction Workers Act as under:-

> *"47. Penalty for contravention of provisions regarding safety measures.- (1) Whoever contravenes the provisions of any rules made under section 40 shall be punishable with imprisonment for a term which may extend to three months, or with fine which may extend to two thousand rupees, or with both, and in the case of a continuing contravention, with an additional fine which may extend to one hundred rupees for every day during which such contravention continues after conviction for the first such contravention.*
>
> *(2) If any person who has been convicted of any offence punishable under sub-section (1) is again guilty of an offence involving a contravention or failure of compliance of the same provision, he shall be punishable on a subsequent conviction with imprisonment for a term which may extend to six months or with fine which shall not be less than five hundred rupees but which may extend to two thousand rupees or with both:*

Provided that for the purposes of this sub-section, no cognizance shall be taken of any conviction made more than two years before the commission of the offence for which the person is subsequently being convicted:

Provided further that the authority imposing the penalty, if it is satisfied that there are exceptional circumstances warranting such a course may, after recording its reasons in writing, impose a fine of less than five hundred rupees."

26. It is the contravention of the rules relating to health or safety measures which constitutes the offence provided by Section 47 quoted above, and for this, *mens rea* i.e. the intention to commit the breach of the rules or abetment thereof on the part of the person sought to be prosecuted is pre-requisite. The case at hand is not one of any of the accused having been previously convicted for such offence and, therefore, the enhanced punishment is not attracted. Having regard to the punishment prescribed, the criminal case comes up before the court of Metropolitan Magistrate as one which may be tried summarily.

27. As observed above, it is the contravention of the provisions of the Rules on the subject of *"safety and health of building workers"*, as envisaged in Section 40, which is made punishable. Though the Delhi Rules have been framed and notified with reference to the rule making power conferred on the appropriate government by section 62, having regard to the subjects that are thereby covered, there can be no dispute that such rules have been framed also in exercise of the power under section 40.

28. The complainant presses the criminal prosecution against the petitioners primarily on the principle of vicarious liability and, for this, the provision contained in Section 53 of the Building and Construction Workers Act is crucial. It reads thus:-

> *"53. Offences by companies.- (1) Where an offence under this Act has been committed by a company, <u>every person 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</u>, as well as the company, <u>shall be deemed to be guilty</u> of the offence and shall be liable to be proceeded against and punished accordingly:*
>
> *Provided that nothing contained in this sub-section shall render any such person liable to any punishment, <u>if he proves that the offence was committed without his knowledge</u> or that <u>he had exercised all due diligence to prevent</u> the commission of such offence.*
>
> *(2) <u>Nothwithstanding anything contained in sub-section (1) where</u> any offence under this Act has been committed by a company and <u>it is proved that the offence has been</u> committed <u>with the consent or connivance of, or is attributable to any neglect on the part of any director</u>, manager, secretary or other officer of the company, such director, manager, secretary or other officer <u>shall be deemed to be guilty of that offence</u> and shall be liable to be proceeded against and punished accordingly.*
>
> *Explanation.- For the purposes of this section,-*
>
> *(a) "company" means any body corporate and includes a firm or other association of individuals; and*
>
> *(b) "director", in relation to a firm, means a partner in the firm."*

(emphasis supplied)

29. As was highlighted during the course of hearing, not only by the learned counsel representing the petitioners, but also by the counsel for the State (the complainant), the afore-quoted provision of Section 53 is almost identical with similar provisions concerning vicarious liability contained in other criminal laws to the effect of which some detailed reference shall need to be made later.

30. It is clear from the bare reading of the statutory clause that where the offence is committed by a company, in order to rope in any other person on the principle of vicarious criminal liability, it must be shown that such person was *"in-charge of and was responsible to the company"* for the conduct of its business *"at the time the offence was committed"*. The proviso to Section 53(1) permits a person arraigned on the principle of vicarious liability to plead and show by evidence, in defence, that he was not responsible either because the acts constituting the offence were committed *"without his knowledge"* or because he had *"exercised all due diligence to prevent the commission of such offence"*. Notwithstanding the main provision contained in Section 53(1), the prosecution may be initiated against *"any Director, Manager, Secretary or other officer of the company"* if there is proof available to show that the offence was committed *"with the consent or connivance of, or is attributable to any neglect on the part of"* such director, manager, secretary or other officer of the company. While section 53(1) relies on *"deeming"* due to the position of the person *vis-a-vis* the company *"in-charge of"* and *"responsible to"*, section

53(2) necessarily requires positive evidence to show active participation reflective of *"consent", "connivance" or "neglect"*.

31. In the criminal complaint on which the impugned order of summoning has been passed, there is reference to similar fatal accidents having occurred previously at the project site in question on 04.09.2011, 11.04.2012, 16.08.2012, 28.02.2013, and 16.01.2014 as well. The present complaint dated 14.08.2014 cannot be treated as a complaint with reference to such previous incidents for two prime reasons; one, there are no averments as to the breach of any specific rules within the meaning of section 47 *vis-à-vis* the previous incidents, and, second, the criminal action *vis-à-vis* such earlier incidents would be barred by limitation as provided in Section 55 of the Building and Construction Workers Act.

32. It is the admitted case of the complainant that the building construction work in the course of which the fatal accident occurred on 17.05.2014 had been entrusted by the land owner company, through a formal contract to the construction contractor company. It is indicated in the complaint itself that the construction contractor company had got itself registered with the statutory authority of the appropriate government in compliance with the requirements of Section 7. The certificate of registration describes the construction contractor company to be the *"establishment"* for purposes of construction of *"DLF Capital Greens Project"* by it, it being a project of *"residential building",* the work to be carried out during 02.01.2012 to 17.11.2014, its representative Mr. Surinder Mohan

being the *"employer"* in-charge of the construction work at site. It is an undisputed case here that the construction contractor company had given the intimation about the commencement of the work in compliance with section 46. It is also admitted that the intimation about the fatal accident was given by the construction contractor company abiding by its responsibility under Section 39.

33. After setting out the facts pertaining to the fatal accident on 07.05.2014, while referring to the previous such incidents, and describing the positions of the petitioners (as indeed of three others who are not before this court) *vis-à-vis* the two companies, the complainant has narrated its case in the complaint in the following manner:-

> *"3. That Sh. Mohit Gujral, Chairman, Sh. Rajeev Talwar, Managing Director, Sh. Sriram Khattar, Director, Sh. Ashok Kuamr Tyagi, Director, Sh. Sudhir Sahgal, Director of M/s. DLF Universal Ltd., Shopping Mall, 3rd Floor, Arjun Marg, DLF City, Block E, DLF Phase 1, Sector 26A, Gurgaon, Haryana 122002 are the "Directors" and Sh. A.M. Naik, Group Executive Chairman, Sh. K. Venkataramanan, CEO & MD, Sh. M.V. Kotwal, Whole time Director & President, Heavy Engg., Sh. S.N. Subrahmanyan, Whole time Director & Sr. EVP (Infrastructure & construction); Sh. R. Shankar Raman, Whole time Director & CFO, Sh. Shailendra Roy, Whole time Director & Sr. EVP (Corporate affairs & power) and Sh. Daljit Singh – Project Director, (In-charge of the construction site) of M/s. Larsen & Toubro Ltd. are the "Directors" of M/s. Larsen & Toubro Ltd. and Sh. Harish Vaid, Manager (Indl. Relations) is the Manager of the construction site within the meaning of Section 53 of the*

said Act (hereinafter called the accused for the purpose of the Act, in the present case).

4. That on dated 17.05.14, at about 3.50 PM, an accident reportedly occurred at the construction site namely "Capital Green Projects" located at 15 Shivaji Marg Delhi-15 at tower no.14 having 21 floors. Upon inspection of the 'Construction Site' on 18.5.2014 at 11.00 AM and further investigation on 24.5.14 at 4.00 PM along with Sh. R.N. Dahiya, Director (ISH) and Sh. J.N.Jain, Dy. Director (ISH)/Inspectors of Building & Construction, it was revealed that a worker namely Ankit Kumar, Painter, was working in tower No.14 on the eighteenth floor and was reportedly engaged in the work of applying paint on the face of the wall, fell to the ground, causing him severe injuries resulting in death.

5. That besides this, prima facie, it appeared on inspections that the management failed to ensure adequate site management as envisaged in the provisions of the Building and other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 and the Delhi Building and other Construction Workers (Regulation of Employment and Conditions of Service) Rules, 2002. Management had not taken all appropriate measures as per the said Act and Rules framed thereunder to prevent accidents at building site of such proportion and magnitude.

6. That there have been 5 fatal accidents resulting into loss of lives of 5 workers in the recent past, at the same site. But, it is clear that they had not learnt any lessons out of previous series of fatal accidents. Apart from notices, a prohibitory order was also issued to them to stop the construction work of entire site till complete/full compliances of all the safety provisions as mentioned in the said Act and Rules frames thereunder as applicable on the construction site of this magnitude were made.

7. That further, repeated deaths clearly pointed to neglect and commissions & omissions and lack of due diligence towards all aspects of human lives, safety and welfare at their site as envisaged in the said Act and Rules framed thereunder.

8. That during the course of inspection and investigation, the following breach of the provisions of the "said Rules" read with the "said Act" were observed:-

I. That the workers working at height were not provided with safety belts and Personal Fall Arrest Systems (PFAS), in contravention of provisions of "Rule 42 and 178 of the said Rules."

II. That the safety nets were not provided at the construction site where the workers were allowed to work at height, in contravention of provisions of Rules 42 and 179 of the said Rules.

III. That the platforms and balconies, from where a worker is liable to fell, had not been provided with suitable & safe guardrails and toeboards of adequate strength, in contravention of the provisions of Rule 196 of the said Rules.

IV. That more than 500; i.e. 2700 workers were ordinarily employed at the construction site but Safety Officers as per qualification and condition of service as laid down in Schedule VIII of the said Rules had not been appointed, in contravention of the provisions of Rule 209 of the said Rules read with Section 38 of the said Act.

V. That the managements have not implemented their Health & Safety Policy in letter and spirit, in contravention of Rule 39 of the said Rules.

9. That the above accused persons are thus guilty of contravening the provisions of Rules 39,42,178,179,196 and 209 of the said Rules read with Sections 38,40 and 53 of the said Act which is punishable under section 47 of the

"Said Act" for an imprisonment for a term which may extent to 03 months or with a fine which may extend to Two Thousand Rupees or with both."

(emphasis supplied)

34. The reference to the prohibitory order having been issued by the statutory authority on 26.05.2014 *vis-à-vis* the project site, being a subsequent action, there is no case of any violation of the said prohibitory order.

35. In the complaint, aside from certain other documents, reference was made to inspection form/reports dated 18.05.2014 and 24.05.2014, show cause notices dated 26.05.2014 and 04.07.2014, reply dated 18.06.2014 of the land owner company and replies dated 04.06.2014, 17.06.2014 and 04.08.2014 of the construction contractor company. The reply dated 17.06.2014 of the construction contractor company, in turn, referred to letters dated 20.05.2014, 03.06.2014, and 25.04.2013 and health and safety policy, as communicated vide letter dated 25.04.2013. As mentioned earlier, pursuant to the directions issued, by order dated 24.09.2018, the complainant has filed the counter-reply dated 28.09.2018. In this reply, the exchange of the abovesaid correspondence, reliance whereupon is made by the petitioners, has been acknowledged.

36. The documents in which regard there is no dispute, upon perusal, show that the land owner company had entered into a contract on 29.03.2012 with the construction contractor company. Concededly, the general conditions of the said contract, as form part

of its third annexure, clearly reveal that the construction contractor company had taken over the entire responsibility for every aspect of construction including safety compliances, liability towards insurance and labour laws. The following stipulations in the contract need to be extracted for confirmation of the above aspect:-

> *"79.0 SAFETY PROCEDURE*
>
> *79.1 The contractor shall incorporate in his operations the requirements of all the 'Safety Codes' issued by the Bureau of Indian Standards and provisions of the National Building Code of India 2005 including any amendments thereof. The Building and Other Construction Workers (Regulation of Employment and Conditions of Services) Act, 1996 and any other applicable statutory rules and regulations. These requirements shall apply in all cases except where the regulations of the local authority require more stringent measures to be taken. Where the requirements of BIS Codes and/or National Building Code, the Building and Other Construction Workers (Regulations of Employment and Conditions of Services) Act, 1996 are duplicated by the local regulations or the "Safety Manual" provided by the Owner, the more stringent of these regulations shall be deemed to apply. The Safety Manual provided by the Owner is only suggestive and shall not cast any liability on the Owner.*
>
> *79.2 The contractor shall provide safe means of access to all working places.*
>
> *79.3 The contractor shall be solely responsible for proper design of the scaffolding, temporary accesses, ladders and ramps, formwork and hoisting arrangements, cranes etc. to ensure safety of workmen as well as the works. All scaffolds, ladders and other safety devices shall be maintained in safe conditions. Only tubular scaffolding shall be used.*

79.4 <u>All necessary personal safety/protective equipment, first aid kit, medically trained personal, fully equipped ambulance and any other facilities as per the statutory requirements should be always available on the site for use. The contractor shall take adequate steps to ensure proper maintenance and use of equipment</u> by his employees/staff/personnel and workers.

79.5 Adequate precautions shall be taken to prevent danger from electrical equipment.

79.6 No materials on the site of work shall be so stacked or placed as to cause danger or inconvenience to any person or the public.

79.7 The contractor shall provide and maintain all necessary temporary fire protection and fire fighting facilities at the site during the execution of the works in accordance with the National Building Code of India 2005 and the statutory regulations. The contractor shall ensure that all gases, fuel and other dangerous and explosive materials and goods are stored and handled in a safe manner and in accordance with the statutory regulations.

79.8 The <u>contractor shall notify the engineer immediately of any occurrence of mishaps or accidents that results in death or injury</u> (including grievous injury) as defined in the Indian Penal Code. Such initial notification may be verbal and confirmed in writing thereafter and shall be followed by a comprehensive written report within 24 hrs of the occurrence/incident. The contractor shall duly complete standard forms as required by the engineer and statutory authorities.

79.9 <u>It is made clear that the contractor alone as the Principal Employer, is answerable and liable to all investigating and legal authorities including Court of Law and the Owner shall not have any part or liability in this regard.</u> The Contractor alone shall be responsible and liable to compensate the victims immediately on the *occurrence of the mishaps or accidents and also protect and indemnify and hold harmless the owner, the engineer and all persons who may be associated with or connected with the owner or the engineer and to reimburse all legal and financial costs, if incurred, by the them in this regard.*

79.10 <u>All consequences, damages or losses arising by reason of any violation of the safety requirements resulting in any injury or loss of life to the contactor's or any sub-contractor's Employees/Staff/personnel and Workers/Third Party (non-fatal/fatal) shall be met by the contractor who alone will be responsible for handling and disposal of the accidental</u> cases with Government/non-Government authorities. The Contractor shall be bound to pay compensation to the persons for the injuries sustained or death owing to neglect of the safety precautions should any claim proceedings be filed against the owner/engineer. The contractor hereby agrees to indemnify the owner and the engineer against all liabilities and keep the owner, his employees, personnel, agents, representatives and anyone connected with the owner, protected from civil and criminal prosecution in such cases and be answerable for the same before all authorities.

79.11 <u>Within one week of commencement date, the contractor shall submit to the engineer, a detailed and comprehensive contract shall submit to the engineer, a detailed and comprehensive contract specific site safety plan, based on the requirements stated in clause 79.1 above. The site safety plan shall include detailed policies, procedures and regulations which, when implemented will ensure safety of all the persons,</u> including third parties on or in the vicinity of the site (including without limitation persons to whom access to the site has been allowed by the contractor). <u>The contractor shall, from time to time as necessary, produce supplements to the site safety plan such</u> that it is at all times a detailed, comprehensive and contemporaneous statement by the contractor of his site safety and industrial health, obligations, responsibilities, *policies and procedure (under the laws of India) or as stated in the contract or elsewhere relating to work on site.*

79.12 Any omission, inconsistency or error in the site safety plan or the Engineer's concurrence or rejection of the Site Safety Plan and/or supplements thereto shall be without prejudice to the Contractor's obligations with respect to Site safety and industrial health and shall not excuse any failure by the contractor to adopt proper and recognized safety practices throughout the execution of works.

79.13 The contractor shall adhere to the Site Safety Plan and shall ensure that all sub-contractors of all tiers have copy of the Site Safety plan and comply with its provisions. The contactor shall appoint a qualified and experienced person as Site Safety Officer to act as Manager of the Site Safety Plan and who will be responsible for all safety matters related to the works. The contractor shall, from time to time, provide such other personnel and resources as may be required to ensure effective operation of the Site Safety Plan. The said Site Safety Officer shall submit regular safety reports to the Engineer in accordance with the requirements of the Engineer and all relevant statutory authorities, as required by Applicable laws and regulations. The contractor shall submit on a monthly basis a Certificate of Compliance for Health, Safety and Environment as given in Appendix "M"."

(emphasis supplied)

37. It appears that in the wake of the fatal incident that occurred on 28.02.2013 (death of Maqbool) at the same very site, prohibitory order followed by revocation order had been issued on 01.03.2013 and 08.03.2013. Against the said backdrop, the construction contractor company had taken steps for getting the safety audit of the project done. An audit report dated 03.04.2013 was submitted to the

authorities by the said company under the cover of its letter dated 25.04.2013. Reference to the said audit report and the correspondence exchanged in such regard was made by the construction contractor company in its letter dated 17.06.2014, which is part of the material that was submitted with the criminal complaint leading to the impugned order being passed. In the reply affidavit dated 28.09.2018, the complainant also confirms that National Safety Council (NSC) which had conducted the said safety audit had given a satisfactory report in respect of the safety measures that had been adopted by the management of the said company and, in view of such audit report, the construction work was allowed to be resumed.

38. As noted earlier, it is admitted case even for the complainant that in terms of the intimations that had been given, Mr. Daljeet Singh, the Project Director of the construction contractor company, was the person "incharge of the construction site" and Mr. Harish Vaid, Manager (Internal relations) was the Manager of the Construction Site, within the meaning of Section 53 of the Building and Construction Workers Act. As also noted earlier, both the said accused persons have not challenged the summoning order.

39. It was also brought out during the course of hearing that at the time of inspection(s), leading to inspection reports dated 18.05.2014, 24.05.2014 being prepared, it was Mr. Daljeet Singh, who was found as the person incharge of the site, he having assisted the complainant's officers in such inspection at the site. The report, prepared on inspection carried out in the forenoon of 18.05.2014, is the most

crucial inspection report for purposes of the case arising out of the incident that occurred in the afternoon of 17.05.2014. It concededly noted, *vis-à-vis* the requirements of Rules 142, 178 and 179 that Personal Fall Arrest System (PFAS) and safety belts had been arranged but not provided to the workers. It also noted that common safety system had not been provided "at various places", though not specifying the locations where there was such deficiency in due compliance. It confirmed that health and safety policy, as required by Rule 39 had been formulated, the breach of the statutory rules was noted for the reason such policy had not been submitted for approval. The report, at the same time, confirmed that the inspecting officer had found and verified that safety committee and emergency action plan in terms of Rules 208 and 36 respectively were in position, the breach of Rule 209, however, being inferred for the reason qualifications of the "safety officer" were not shown. In the brief note of the concluding part of this report, it was further observed that the temporary platform from where the worker had fallen did not have the provision of toe board or guard rail. The inspection report dated 24.05.2014 is in continuation of the report dated 18.05.2014 and mainly noted that Ankit Kumar (the deceased worker) was applying paint on the face of the wall at the 18th floor level when he had slipped and fallen to the ground, he not wearing the safety belt or PFAS at that point of time.

40. Pursuant to the inquiries which were raised in the wake of the fatal incident of 17.05.2014, the construction contractor company had admittedly sent various letters including letters dated 20.05.2014 and

03.06.2014 followed by another dated 17.06.2014, the last referring to the previous correspondence, which concededly includes submission by the construction contractor company and yet another safety audit report obtained from National Safety Council, Delhi Chapter, such audit having been undertaken on 24th and 25th May, 2014. It was submitted by the construction contractor company that it was in full compliance with the statutorily prescribed health and safety measures, this having been confirmed by the safety audit report of May, 2014, the safety policy having been formulated and forwarded to the authorities by letter dated 25.04.2014, duly qualified duty safety officers having been deployed at site, the steps taken inclusive of the following:-

> *"2. On site safety measures :*
>
> *a). L&T has deployed (3) Safety Managers, (5) Safety Engineers (12) Safety Supervisors and (30) Safety Stewards at site to control and monitor the safety measures.*
>
> *b). L&T has provided personal protective Equipment to all workers and its usage is enforced prior to construction site entry.*
>
> *c). The workers are briefed about the hazards involved in particular activity before start of the shift.*
>
> *d). L&T has protected the floor edge with hard barricades.*
>
> *e). L&T has protected all openings, cut outs with reinforcement mat.*
>
> *f). L&T has closed all lift shafts with gates.*

g). Safety catch nets are provided below 6 m of live working floor around periphery to prevent fall of materials and men.

h). All plants and machineries are fitted with safety device and are frequently inspected and tested for safety compliance.

i). All electrical connections are routed through RCCB, MCB and at source through ELR to avoid any electrocution and overload protection.

3. Medical and other facilities :

a). Round the clock ambulance and first aid facilities provided at site.

b). Well maintained canteen at site and workers habitat area.

c). Continuous water facilities for drinking and sanitation facilities.

d). Mobile toilets at various places at site and permanent sanitation facilities in workers habitat area.

Apart from the above, all the safety and welfare aspects of the workers are duly taken care of at the work site. That L&T had got the Safety Audit conducted by National Safety Council, Delhi Chapter in the year 2013. The Audit Team after doing extensive survey / checking at site, submitted its report. The relevant excerpts of the reports are as under :

a). M/s. L&T had provided adequate no. of Safety Officers to deal with the requirements of safety management in the Plant. There is proper work distribution amongst these Safety Officers to prevent clash in responsibility.

b). The owner had appointed expert consultant organization M/s. Turner, who has appointed NEBSOH qualified Safety Officers.

c) work at Height permit: In Indian Construction majority of fatalities occurs due to fall of workers from height. Due to this high probability, it had become necessary to ensure implementation of Height Work Permit. Under the permit only those workers are allowed to proceed or work at height for whom safe access – like ladders are provided and safe work place like scaffolds exists there. This system is provided by L&T as shown to the Auditors.

d) Personal Protective Equipments

- *The use of safety helmet by all the construction workers was almost 100%.*
- *The use of safety belts by those who were working on external side and have potential hazard of fall, was more than 98%, as one worker was found working without anchoring it with rigid support.*
- *Use of safety shoe was observed almost 100%.*

e) Lifting Equipment and Tackles

M/s L &T had got numerous lifting equipments and tackles. The safe use of one lifting equipment was checked. It was found that the operator was duly trained and the operator and the signaler were understanding the signals very well.

f) Hazards of Working at Height

L&T had taken the following measures to prevent fall of workers from height:

- *All the openings at higher elevations were found covered with bar net.*
- *All the floor edges were suitably fenced with appropriate hand rails.*
- *The stairs were cleaned for prevention of slipping due to slippery floor.*

That in view of the observations of National Safety Council (Delhi Chapter) in its report after conducting extensive checks/surveys on site, it can be safely inferred that the Establishment has been complying with all the safety norms as required under the law including BOCW (RE&CS) Act. Any mishap at site despite best protective measures could be an accident only with no human fault or error. L& T has done its best to comply with all the safety norms, which have been subject matter of surprise checks and the same have been found to be in order.

Without prejudice to what is stated above, it is submitted that L & T had also got another Safety Audit Report done during 24-25th May, 2014 by the National Safety Council Delhi Chapter and nothing adverse has been reported in the Audit Report submitted. Copy of the Safety Audit report and the relevant photographs of the site are annexed as Annexure A (colly). Further, the establishment has got its audit done from DGFASLI and the report is awaited and the same shall be submitted as and when it is received.

41. The questions relating to corporate liability and vicarious criminal liability of those connected to a corporate body have come up in the past before the courts in the context of similar provisions contained in various statutes including Section 141 of the Negotiable Instruments Act, 1881 (for short, "Negotiable Instruments Act"); Section 34 of Drugs and Cosmetics Act, 1940 (for short, "Drugs

Act"); Section 17(1) of the Prevention of Food Adulteration Act, 1954 (for short, 'PFA Act"); and Section 33 of the Insecticides Act, 1968 (for short, "Insecticides Act").

42. On corporate criminal liability, the following observations of a constitution bench of Supreme Court in *Standard Chartered Bank & Ors vs. Directorate of Enforcement & Ors (2005) 4 SCC 530* provide useful guidance:-

> *"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.*
>
> *"xxx*
>
> *As in the case of torts, the general rule prevails that the corporation may be criminally liable for the acts of an officer or agent, assumed to be done by him when exercising authorised powers, and without proof that his act was expressly authorised or approved by the corporation. In the statutes defining crimes, the prohibition is frequently directed against any "person" who commits the prohibited act, and in many statutes the term "person" is defined. Even if the person is not specifically defined, it necessarily includes a corporation. It is usually construed to include a corporation so as to bring it within the prohibition of the statute and subject it to punishment. In most of the statutes, the word "person" is defined to include a corporation.*

xxx

Inasmuch as all criminal and quasi-criminal offences are creatures of statute, the amenability of the corporation to prosecution necessarily depends upon the terminology employed in the statute. In the case of strict liability, the terminology employed by the legislature is such as to reveal an intent that guilt shall not be predicated upon the automatic breach of the statute but on the establishment of the actus reus, subject to the defence of due diligence. The law is primarily based on the terms of the statutes. In the case of absolute liability where the legislature by the clearest intendment establishes an offence where liability arises instantly upon the breach of the statutory prohibition, no particular state of mind is a prerequisite to guilt. Corporations and individual persons stand on the same footing in the face of such a statutory offence. It is a case of automatic primary responsibility. Therefore, as regards corporate criminal liability, there is no doubt that a corporation or company could be prosecuted for any offence punishable under law, whether it is coming under the strict liability or under absolute liability.

xxx

All penal statutes are to be strictly construed in the sense that the court must see that the thing charged as an offence is within the plain meaning of the words used and must not strain the words on any notion that there has been a slip that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. All penal provisions like all other statutes are to be fairly construed according to the legislative intent as expressed in the enactment."

43. By virtue, *inter alia*, of the registration dated 22.02.2012 granted to the constructions contractor company by the respondent

under Section 7 of the Building and Construction Workers Act, the complainant was privy to the above-said contractual arrangement *vis-à-vis* the project in question between the land owner company and the construction contractor company.

44. It is vivid from bare perusal of the provisions of the Building and Construction Workers Act, as indeed the rules framed thereunder, that the land owner company having chosen to outsource the work of the constructions, had passed on the responsibility for all compliances to be made by the construction contractor company in terms of the law, and the contractual arrangement, to which detailed references have been made above. It is the construction contractor company which was given the responsibility of carrying out the construction work and, for such purpose, engage the workers. Under the law, it is the construction contractor company which, in the present case, is "*the employer*" – the establishment which was to make compliances for safety measures to be put in position. There is no responsibility shown of the land owner company, or anyone connected thereto, this having been clearly understood and explicitly so stated even in the contract entered upon by it with the construction contractor company on 29.03.2012. Thus, neither the land owner company nor those in-charge of or responsible to the conduct of its business can be prosecuted for the offence under Section 47 of the Building and Construction Workers Act on the facts set out in the complaint from which the present petitions arise.

45. The case against the construction contractor company and those stated to be in-charge of or responsible for conduct of its business, however, would stand on a different footing and, thus, need scrutiny separately.

46. In *Municipal Corporation of Delhi vs. Ram Kishan Rohtagi and Ors., (1983) 1 SCC 1*, while dealing with the applicability of Section 17(1) of PFA Act, the Supreme Court observed as under:-

> *"15. So far as the Manager is concerned, we are satisfied that from the <u>very nature of his duties it can be safely inferred</u> that <u>he would undoubtedly be vicariously liable for the offence</u>; vicarious liability being an incident of an <u>offence under the Act</u>. So far as the Directors are concerned, there is not even a whisper nor a shred of evidence nor anything to show, apart from the presumption drawn by the complainant, <u>that there is any act committed by the Directors</u> from <u>which a reasonable inference can be drawn that they could also be vicariously liable.</u> In these circumstances, therefore, we find ourselves in complete agreement with the argument of the High Court that no case against the Directors (Accused 4 to 7) has been made out ex facie on the allegations made in the complaint and the proceedings against them were rightly quashed.*

(emphasis supplied)

47. Following the aforesaid ruling, in construing the effect of Section 34 of the Drugs Act in a decision reported as *State of Haryana vs. Brij Lal Mittal and Ors., (1998) 5 SCC 343*, it was held thus:-

> *"8 ...the vicarious liability of a person for being prosecuted for an offence committed under the Act by a company arises <u>if at the material time he was in charge of</u>*

<u>and was also responsible to</u> the company <u>for the conduct of its business</u>. Simply because a person is a director of the company it does not necessarily mean that he fulfils both the above requirements so as to make him liable. Conversely, <u>without being a director a person can be in charge of and responsible to the company for the conduct of its business</u>. From the complaint in question we, however, find that except a bald statement that the respondents were directors of the manufacturers, there is no other allegation to indicate, even prima facie, that they were in charge of the company and also responsible to the company for the conduct of its business."

(emphasis supplied)

48. The counsel for the petitioners have placed reliance on *National Small Industries Corpn. Ltd. vs. Harmeet Singh Paintal, (2010) 3 SCC 330 and Pooja Ravinder Devidasani vs. State of Maharashtra and Anr., (2014)16 SCC 1* both dealing with issues of vicarious liability under the Negotiable Instruments Act. In *National Small Industries* Corpn. Ltd. (supra), it was observed thus:-

"13. Section 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, <u>not sufficient to make a bald cursory statement in a complaint that</u> the Director (arrayed as an accused) <u>is in charge of and responsible to the</u> company for the conduct of the business of the company without anything more as to the role of the Director. But <u>the complaint should spell out as to how and in what manner Respondent 1 was in charge of or was responsible to</u> the accused Company for the conduct of its business. This is in consonance with strict

interpretation of penal statutes, <u>especially, where such statutes create vicarious liability</u>.

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.

(emphasis supplied)

49. In *Pooja Ravinder Devidasani* (supra) while observing that "*a director of a company is liable to be convicted for an offence committed by the company if he / she was in charge of and was responsible to the company for the conduct of its business or if it is proved that the offence was committed with the consent or connivance of, or was attributable to any negligence on the part of the Director concerned*" and noting that "*in the entire complaint neither the role of the appellant in the affairs of the company was explained nor in what manner the appellant is responsible for the conduct of business of the company was explained*", the prosecution against the appellant for the offence under Section 138 of the Negotiable Instruments Act was quashed.

50. While examining similar questions vis-à-vis Section 33 of Insecticides Act, in judgment reported as *State of NCT of Delhi vs. Rajiv Khurana, (2010) 11 SCC 469,* taking note of the law which has developed primarily in the context of Section 141 of Negotiable Instruments Act, it was held thus:-

> *"17. The ratio of all these cases is that the complainant is required to state in the complaint how a Director who is sought to be made an accused, was in charge of the business of the company or responsible for the conduct of the company's business. Every Director need not be and is not in charge of the business of the company. If that is the position with regard to a Director, it is needless to emphasise that in the case of non-Director officers, it is all the more necessary to state what were his duties and responsibilities in the conduct of business of the company and how and in what manner he is responsible or liable."*
>
> *(emphasis supplied)*

51. Reliance has also been placed on the decision of the Supreme Court reported as *S.M.S. Pharmaceuticals Ltd. vs. Neeta Bhalla, (2005) 8 SCC 89; Gunmala Sales vs. Anu Mehta, (2015) 1 SCC 103 and Standard Chartered Bank vs. State of Maharashtra, (2016) 6 SCC 62*, all cases dealing with issues relating to the effect and import of Section 141 of Negotiable Instruments Act. Taking note of such decisions in *Jwala Devi Enterprises P. Ltd. vs. Fadi El Jaouni, 2018 SCCOnline Del 10030* this Court culled out the settled law as under:-

> *"14. The guiding principles with reference to Section 141 of the Negotiable Instruments Act, 1881, which are now well settled by judicial pronouncements, some of which have been noted above, may be summarised thus:—*
>
> > *(i) It is only those persons who are in charge of or responsible for the conduct of the business of the company at the time of commission of the offence under Section 138 of the Negotiable Instruments Act, 1881 who*

can be subjected to criminal action with reference to Section 141;

(ii) If the person committing an offence under Section 138 of the Negotiable Instruments Act, 1881 is a company, the person who was signatory to the cheque which is dishonoured is clearly responsible for the incriminating act and would be liable to be proceeded against under Section 141 (2);

(iii) By virtue of the office they hold, the persons working in the capacity of the Managing Director or Joint Managing Director are deemed to be in charge of, and responsible for the conduct of the business of, the company and, therefore, can be proceeded against in terms of Section 141;

(iv) Merely because a person is a director of the company is not sufficient to make him liable under Section 141, there being no deeming that by holding such position he is in charge of, or responsible for the conduct of the business of, the company within the meaning of Section 141;

(v) It is necessary for the complainant to specifically aver in the complaint that at the time the offence was committed, the person sought to be prosecuted was in charge of, or responsible for the conduct of the business of, the company in terms of Section 141, there being no need for further particulars to be given in the complaint about his role, this being subject to proof at the trial;

(vi) The person who has been summoned as an accused for offence under Section 138 of the Negotiable Instruments Act, 1881 on the basis of averment that he was director of the company accused, he being in charge of or

responsible for the conduct of its business cannot get the complaint quashed by the High Court by filing a petition under Section 482 of the Code of Criminal Procedure, 1973 merely on the ground that no particulars as to his role have been set out in the complaint; and

(vii) The person who has been summoned as an accused for offence under Section 138 of the Negotiable Instruments Act, 1881 by invoking the provision contained in Section 141 may persuade the High Court to quash the process in exercise of its inherent power under Section 482 of the Code of Criminal Procedure, 1973 by furnishing "some sterling incontrovertible material or acceptable circumstances" substantiating his contention that he was not in charge of nor responsible for the conduct of the business of the company "at the time the offence was committed" and thereby showing a case that making him stand the trial would be an abuse of the process of court, but not otherwise."

(emphasis supplied)

52. Having regard to the statutory scheme and also the stipulations of the contract dated 29.03.2012, there is no escape from the *prima facie* conclusion that the construction contractor company is not only the principal employer of the workers engaged in the construction project where the fatal accident took place but was also responsible for arranging all the prescribed safety measured under the Rules. Section 47 read with Section 53 of the Building and Construction Workers Act thus creates a corporate criminal liability against the said company and by virtue of the principles of vicarious criminal liability, every person who, at the time when the said offence was committed, was in-charge

of, and was responsible to, the said company for the conduct of its business, as well as the company, are deemed to be liable to be proceeded against. Just as in the case of Section 141 of Negotiable Instruments Act, by virtue of the office they hold, such persons as work in the capacity of a managing director or the joint managing director or, for that matter, persons employed as in-charge of the construction work at site, be it in a managerial position or in any supervisory position, are deemed to be in-charge of and responsible for the conduct of the business, to the company. They can, therefore, be proceeded against in terms of Section 53. At the same time, however, merely because a person is a "*director*" of the company is not sufficient to attract Section 53, there being no deeming that by holding such position he is rendered to be one who is "*in-charge of*" or "*responsible to the company*" for the conduct of its business. As is also well settled in the context of prosecutions under the Negotiable Instruments Act, though it is necessary to specifically aver in the complaint that the person sought to be prosecuted was in-charge of or responsible to the company for the conduct of its business "*at the time the offence was committed*", there is no requirement in law for "*further particulars to be given*" in the complaint about his role, this being subject matter of proof to be adduced at the trial.

53. In the considered view of this Court, the words "*for the conduct of the business of the company*" appearing in Section 53 are most crucial, pregnant with meaning and provide the key to determine whether a person connected to the company may be held accountable

for the acts of commission or omission constituting the offence under Section 47 of the Building and Construction Workers Act. After all, it is the status of being "*in-charge of*" or being "*responsible*" for such business of the company that exposes the individual to vicarious criminal liability. If the act of commission or omission is attributable to the neglect of the person or on account of his "*connivance*" or for that matter, with his "*consent*", sub-section (2) of Section 53 directly attracts the application of penal provision. For the deeming clause contained in sub-section (1) of Section 53 to kick in, there has to be a nexus between the area of responsibility of the person concerned, on one hand, and the act of commission or omission leading to the contravention of the rules under Section 40, on the other. To put it more precisely, and clearly, in the context of the offence under Section 47 of Building and Construction Workers Act, the responsibility *vis-à-vis* the specific rule framed under Section 40 (the breach of which is alleged) has to be shown to be in existence for a person connected with the business of the company presumed to be "*in-charge*" or "*responsible*". There can be no thumb rule that every person "in-charge of " or "responsible to" for the conduct of the business of the company in the general sense of the term would be vicariously liable under the criminal law whether or not he was expected to play any specific role or discharge responsibility towards a specific rule, at the stage when its breach has led to the fatality or serious incident.

54. A different approach than the one above to the subject might lead to unjust results. This may be illustrated by two simple

examples. As noted earlier, the employer (*establishment*) is duty bound, in terms of Section 46(1)(g), to give intimation, prior to commencement of the building or other construction work, as to the name and designation of the person who will be "*in overall charge*" of the building or such construction work. Having regard to the scheme of the enactment and the rules framed thereunder, the employer (*establishment*) is also responsible to frame a "*safety policy"* (rule 39) and also to appoint and deploy a "*safety officer"* (rule 209). If the breach relates to default in framing of a written statement of safety policy, or appointment of a duly qualified safety officer, by the establishment, the person appointed as *"overall in charge of"* the *"construction work at site*" cannot be held accountable. After all, framing of policy, or appointment of safety officers, as required by law, are matters of policy and subject to decision of the persons at superior levels (unless the authority is delegated to the one who is in-charge at site) including those working as managing director. Similarly, if those responsible for framing or taking of policy decisions or making available all requirements in the nature of manpower (safety officers) or safety equipment (safety belts, safety net etc.) have done their bit and the breach of the rules noted at the level of the supervisory staff at the construction site (i.e. the person in-charge of the construction work at site under Section 46 or those assisting him in the task) they having not ensured the safety equipment to be availed of by the workers, the former (those responsible for the conduct of the business at the higher levels) cannot be held accountable under the deeming provision.

55. It is the argument of the petitioners connected to the construction contractor company viz., A M Naik (Crl.M.C. 2069/2015), K Venkatramanan (Crl.M.C. 2068/2015), M V Kotwal (Crl.M.C 2070/2015), S.N. Subrahmanyam (Crl.M.C. 1873/2015), R Shankar Raman (Crl.M.C. 2072/2015) and Shailendra Roy (Crl.M.C. 2071/2015) that they had discharged their responsibility for due compliances to be made, in letter and spirit, with the provisions of Building and Construction Workers Act and the rules framed thereunder and that the breaches, if any, occurred at the level of the person(s) in-charge of the construction site i.e. Daljit Singh, Project Director and Harish Vaid, Manager (Industrial Relations). It is further their argument that it is not correct to accuse them, under the deeming provision of Section 53, of complicity in the offence under Section 47 in the context of the fatal accident of 17.05.2014 also for the reason that the worker in question (Ankit Kumar) had been engaged by a sub-contractor, the representative of such sub-contractor being the person who has been found responsible in the investigation by police in the corresponding case for IPC offences. In this context, they crave reference to the sub-contract in terms of which the deceased worker (Ankit Kumar) had been deployed at the 18th floor level from where he fell to the ground to suffer mortal injuries.

56. The copy of the sub-contract, as shown at the hearing cannot be treated (without proper proof) as authentic or "*incontrovertible material*" or as one exonerating the construction contractor company of its entire responsibility in the matter, particularly in view of its

continued responsibility *vis-à-vis* the conduct of the sub-contractor as per clause 79.13 of the contract dated 29.03.2012, referred to earlier. The argument based on the sub-contract entered upon by the construction contractor company with the immediate employer of the deceased worker cannot also be accepted at this stage of the proceedings, particularly in exercise of the power and jurisdiction of this Court under Section 482 Cr.P.C., inasmuch as it involves questions of fact [*Rajiv Thapar and Ors. vs. Madan Lal Kapoor, (2013) 3 SCC 330].*

57. There is no contest to the submission that the construction contractor company is a group of companies comprising of a large number of subsidiaries (130) and associate independent companies (15), it being structured in a manner that each of its such subsidiaries has its own separate Board of Directors and supervisory personnel using the nomenclature of Chief Executive Officer (CEO), Chief Financial Officer (CFO) and Human Resources (HR) Head. The subsidiaries and the associate companies have been incorporated to operate in different schemes or spheres including building and factories, civil infrastructure, metallurgical & material handling, power transmission and distribution, hydrocarbon engineering, valves, alloys, power development, infotech, finance, construction and mining machinery etc.

58. The complaint on which the summoning order was passed itself describes Mr. A.M. Naik, petitioner in Crl.M.C.2069/2015 to be the Group Executive Chairman of the construction contractor company.

Similarly, the description of Mr. M.V. Kotwal, Mr. R. Shankar Raman and Mr. Shailendra Roy – petitioners in Crl.M.C. Nos. 2070/2015, 2072/2015 and 2071/2015, - even as per the complainant has been that they were working at the relevant point of time in the capacities of whole-time Director and President (Heavy Engineering), whole-time Director and Chief Financial Officer (CFO), and whole-time Director and Senior Executive Vice President (Corporate Affairs and Power) respectively. By no stretch of reasoning or logic, these four petitioners can be said to be responsible for the compliances to be made with regard to the prescribed safety measures concerning the construction project in question. By virtue of the respective positions each of them held, their responsibilities had no nexus with the subject at hand.

59. Unlike the above, it cannot be said that the offices held, or the responsibilities shouldered, by Mr. K. Venkataramanan (petitioner in Crl.M.C. 2068/2015) or Mr. S.N. Subrahmanyam (petitioner in Crl.M.C.1873/2015) had no connection with the obligations of the establishment of the "*employer*" (construction contractor company) towards compliances of the Building and Construction Workers Act or the rules framed thereunder. These petitioners do not dispute that at the time of alleged commission of the offence under Section 47 of the Building and Construction Workers Act, they were working for the construction contractor company in the capacity of CEO & Managing Director and whole-time Director & Senior Executive Vice President (Infrastructure & Construction) respectively.

60. The very description of the port-folios they held and the responsibilities that would entail therefrom *prima facie* shows that the allegations in the criminal complaint as to their deemed liability under Section 53 cannot be said to be unfounded, not the least without trial.

61. There is merit in the argument of the last two above-mentioned petitioners that given the positions held by them in the company, they could not be expected to remain present at the construction work site to ensure due compliances to be made with rules 42, 178, 179 or 196 read with Section 38 of the Building and Construction Workers Act that concern day-to-day use of safety belts, safety nets, safety platforms, or personal fall arrest systems. But then, it cannot be ignored that in (eighth para of) the complaint (extracted earlier), there are also allegations of breach on account of non-implementation (*in letter and spirit*) of health and safety policy in terms of rule 39 and non-appointment of duly qualified safety officers in breach of the requirements of rule 209 read with Section 38 of the Building and Construction Workers Act. These two specific areas cannot, by any stretch of arguments, be relegated to the domain of the managerial staff (Mr. Daljit Singh and Mr. Harish Vaid) made in-charge of the construction site.

62. The above petitioners, however, also raise the defence based on the two safety audit reports, one dated 03.04.2013 and the other dated 24-25.05.2014. It would be a subject matter of factual inquiry as to whether the safety audit report submitted on 25.04.2014, obtained after the fatal accidents in question, can be treated as one representing

the correct position prevailing at the time of commission of the offence. Further, it would be the onus of the defence to show that the certification by audit report 03.04.2013 would hold good till date of the fatal accident of 17.05.2014. There are specific allegations in the complaint that as on the said date, *i.e.,* 17.05.2014, duly qualified safety officers were not in position they having not been appointed in terms of the obligation of the construction contractor company under rule 209 read with Section 38 of the Building and Construction Workers Act. Since this area would fall *prima facie* within the domain of the responsibilities held by petitioners K. Venkataramanan and S.N. Subrahmanyam, they are liable to be proceeded against under the deeming clause of Section 53. At the trial, they would have the opportunity, in terms of proviso to Section 53(1), to prove that the breaches constituting the offences were committed without their knowledge or that they had exercised all due diligence to prevent commission of such breaches (or offences).

63. On the above facts, and in the circumstances, initiation of criminal action against petitioners – DLF Universal Ltd. (petitioner in Crl.M.C.2064/2015), Mohit Gujral (petitioner in Crl.M.C.2067/2015), Rajeev Talwar (petitioner in Crl.M.C.2066/2015), Shriram Khattar (petitioner in Crl.M.C.2160/2015), Ashok Kumar Tyagi (petitioner in Crl.M.C.2159/2015), Sudhir Sahgal (petitioner in Crl.M.C.2158/2015), A.M. Naik (petitioner in Crl.M.C.2069/2015); M.V. Kotwal (petitioner in Crl.M.C.2070/2015), R. Shankar Raman (petitioner in Crl.M.C. 2072/2015) and Shailendra Roy (petitioner in

Crl.M.C.2071/2015) being unfounded, the continuation of such proceedings against them would be an abuse of the process of law. Therefore, their petitions are allowed and the proceedings against them in the criminal complaint case (CC 55F1/14) pending in the court of the Metropolitan Magistrate are hereby quashed.

64. For the reasons set out above, however, there is no case made out for this court to exercise its inherent power and jurisdiction under Section 482 Cr.P.C. to inhibit the criminal proceedings in the aforementioned case against S.N. Subrahmanyam (petitioner in Crl.M.C.1873/2015) and K. Venkataramanan (petitioner in Crl.M.C.2068/2015). In the consequence, the said petitions are hereby dismissed. It must, however, be added that nothing stated above would be treated as final expression of opinion on merits of the case against the said petitioners.

65. The petitions and the applications filed therewith are disposed of in above terms.

(R.K. GAUBA)
JUDGE

NOVEMBER 19, 2018
vk/nk/yg