

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

% Decided on: 13th July, 2018

+ **W.P.(CRL) 2971/2017 and Crl. M.A. No.17269/2017 (Stay)**

APARNA GUPTA

..... Petitioner

Represented by: Mr. Siddharth Aggarwal, Mr. Shri Singh, Mr. Aditya Singh, Ms. Jhanvi Dubey, Mr. Maneka Khanna and Ms. Mehak Nakra, Advocates.

versus

STATE OF NCT OF DELHI & ANR

..... Respondents

Represented by: Mr. R.S. Kundu, Additional Standing Counsel for State with Ms. Suman Saharan and Mr. Bhagat Singh, Advocates with SI Amit Mann, PS Defence Colony.
Mr. Narender Mann, Amicus Curiae for the complainant/respondent No.2.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. On a complaint filed by the respondent No.2 FIR No. 145/2010 was registered at PS Defence Colony, New Delhi under Section 336 IPC.
2. Allegations of respondent No.2 in the complaint were that on 17th November, 2010 at about 2.00 PM he had taken his minor child aged 18 months for vaccination at ADIVA Health Care 15, Anand Lok, August Kranti Marg, New Delhi. After seeing the chart one doctor called the sister (nurse) on intercom and instructed to give a vaccination to the baby namely Infranrix (DPT vaccination) and asked the sister to get the vaccination from

the pharmacy. The sister got the vaccine from the pharmacy and gave it to the doctor. On receiving, the doctor saw the vaccine, kept it on the table and started preparing the vaccine. In the meantime, complainant picked up the vaccine to see the rate and was stunned to see that the vaccine had already expired in July, 2010. It is the case of the respondent No.2 that despite the fact that four months have elapsed, the doctor of ADIVA and the pharmacy deliberately kept expired drug.

3. During the course of investigation documents were collected from the hospital to ascertain the person responsible for maintaining the drugs at the pharmacy and to weed off expired drugs. A certificate dated 31st January, 2011 along with job list was issued by ADIVA stating that it was the duty of the pharmacist Nitesh Kumar Singhal. Thus pursuant to an investigation, a charge sheet was filed by the Investigating Officer arraying only Nitesh Kumar Singhal as an accused. Charge for offence punishable under Section 336 IPC was framed against Nitesh Kumar Singhal whereafter four witnesses were examined including the complainant (PW-2) and the representative of the hospital (PW-3) who stated that it was the sole responsibility of Nitesh Kumar Singhal. An application was filed by the complainant for summoning the concerned doctor as well as the hospital under Section 319 Cr.P.C. It is on this application that the hospital was summoned as an accused. The petitioner happens to be one of the Directors of the hospital who appeared in the Court on behalf of the hospital and was made to furnish the bail bond and the surety bond. Thereafter, on 6th October, 2017 charge for offence punishable under Section 336 IPC has been framed against the petitioner. As far as the concerned doctor who was

preparing for vaccination is concerned as per the complainant the same was Dr.Pankaj however, till date he has not appeared in the Court.

4. The present petition relates to Ms. Aparna Gupta, Director of ADIVA only and the moot question in the present petition is whether Ms.Aparna Gupta can be held vicariously liable for the act of the pharmacist who sold the expired drug or even the doctor who was preparing for administering the vaccination.

5. The issue whether a Director of a company can be vicariously liable for a criminal offence attributed to the company came up for consideration before the Supreme Court in the decision reported as 2015 (40 SCC 609 Sunil Bharti Mittal vs. CBI wherein it was held:

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

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

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

44. When the company is the offender, vicarious liability of the Directors cannot be imputed automatically, in the absence of any statutory provision to this effect. One such example is Section 141 of the Negotiable Instruments Act, 1881. In *Aneeta Hada* [*Aneeta Hada v. Godfather Travels & Tours (P) Ltd.*, (2012) 5 SCC 661 : (2012) 3 SCC (Civ) 350 : (2012) 3 SCC (Cri) 241] , the Court noted that if a group of persons that guide the business of the company have the criminal intent, that would be imputed to the body corporate and it is in this backdrop, Section 141 of the Negotiable Instruments Act has to be understood. Such a position is, therefore, because of statutory intendment making it a deeming fiction. Here also, the principle of “alter ego”, was applied only in one direction, namely, where a group of persons that guide the business had criminal intent, that is to be imputed to the body corporate and not the vice versa. Otherwise, there has to be a specific act attributed to the Director or any other person allegedly in control and management of the company, to the effect that such a person was responsible for the acts committed by or on behalf of the company.

45. This very principle is elaborated in various other judgments. We have already taken note of *Maharashtra State Electricity Distribution Co. Ltd.* [*Maharashtra State Electricity Distribution Co. Ltd. v. Datar Switchgear Ltd.*, (2010) 10 SCC 479 : (2011) 1 SCC (Cri) 68] and *S.K. Alagh* [*S.K. Alagh v. State of U.P.*, (2008) 5 SCC 662 : (2008) 2 SCC (Cri) 686] . A few other judgments reiterating this principle are the following:

45.1. *Jethsur Surangbhai v. State of Gujarat* [1984 Supp SCC 207 : 1984 SCC (Cri) 474] : (SCC pp. 210-11, para 9)

“9. ... With due respect what the High Court seems to have missed is that in a case like this where there was serious defalcation of the properties of the Sangh, unless the prosecution proved that there was a close cohesion and collusion between all the accused which formed the subject-matter of a conspiracy, it would be difficult to prove the dual charges particularly against the appellant (A-1).

The charge of conspiracy having failed, the most material and integral part of the prosecution story against the appellant disappears. The only ground on the basis of which the High Court has convicted him is that as he was the Chairman of the Managing Committee, he must be held to be vicariously liable for any order given or misappropriation committed by the other accused. The High Court, however, has not referred to the concept of vicarious liability but the findings of the High Court seem to indicate that this was the central idea in the mind of the High Court for convicting the appellant. In a criminal case of such a serious nature mens rea cannot be excluded and once the charge of conspiracy failed the onus lay on the prosecution to prove affirmatively that the appellant was directly and personally connected with acts or omissions pertaining to Items 2, 3 and 4. It is conceded by Mr Phadke that no such direct evidence is forthcoming and he tried to argue that as the appellant was Chairman of the Sangh and used to sign papers and approve various tenders, even as a matter of routine he should have acted with care and caution and his negligence would be a positive proof of his intention to commit the offence. We are however unable to agree with this somewhat broad statement of the law. In the absence of a charge of conspiracy the mere fact that the appellant happened to be the Chairman of the Committee would not make him criminally liable in a vicarious sense for Items 2 to 4. There is no evidence either direct or circumstantial to show that apart from approving the purchase of fertilisers he knew that the firms from which the fertilisers were purchased did not exist. Similar is the case with the other two items. Indeed, if the Chairman was to be made liable then all members of the Committee viz. Tahsildar and other nominated members, would be equally liable

because all of them participated in the deliberations of the meetings of the Committee, a conclusion which has not even been suggested by the prosecution. As Chairman of the Sangh the appellant had to deal with a large variety of matters and it would not be humanly possible for him to analyse and go into the details of every small matter in order to find out whether there has been any criminal breach of trust. In fact, the hero of the entire show seems to be A-3 who had so stage-managed the drama as to shield his guilt and bring the appellant in the forefront. But that by itself would not be conclusive evidence against the appellant. There is nothing to show that A-3 had either directly or indirectly informed the appellant regarding the illegal purchase of fertilisers or the missing of the five oil engines which came to light much later during the course of the audit. Far from proving the intention the prosecution has failed to prove that the appellant had any knowledge of defalcation of Items 2 to 4. In fact, so far as Item 3 is concerned, even Mr Phadke conceded that there is no direct evidence to connect the appellant.”

(emphasis supplied)

45.2. *Sham Sunder v. State of Haryana* [(1989) 4 SCC 630: 1989 SCC (Cri) 783] : (SCC p. 632, para 9)

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

(emphasis supplied)

45.3. *Hira Lal Hari Lal Bhagwati v. CBI* [(2003) 5 SCC 257: 2003 SCC (Cri) 1121] : (SCC p. 277, para 30)

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

(emphasis supplied)

45.4. *Maksud Saiyed v. State of Gujarat* [(2008) 5 SCC 668 : (2008) 2 SCC (Cri) 692] : (SCC p. 674, para 13)

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

(emphasis supplied)

45.5. *R. Kalyani v. Janak C. Mehta* [(2009) 1 SCC 516 : (2009) 1 SCC (Cri) 567] : (SCC p. 527, para 32)

“32. Allegations contained in the FIR are for commission of offences under a general statute. A

vicarious liability can be fastened only by reason of a provision of a statute and not otherwise. For the said purpose, a legal fiction has to be created. Even under a special statute when the vicarious criminal liability is fastened on a person on the premise that he was in charge of the affairs of the company and responsible to it, all the ingredients laid down under the statute must be fulfilled. A legal fiction must be confined to the object and purport for which it has been created.”

45.6. *Sharon Michael v. State of T.N.* [(2009) 3 SCC 375 : (2009) 2 SCC (Cri) 103] : (SCC p. 383, para 16)

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

(emphasis supplied)

45.7. *Keki Hormusji Gharda v. Mehervan Rustom Irani* [(2009) 6 SCC 475 : (2009) 2 SCC (Cri) 1113] : (SCC pp. 480-81, paras 16-19)

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

Company as also the Architect can be said to have committed an offence under Section 341 IPC.

17. The Penal Code, 1860 save and except in some matters does not contemplate any vicarious liability on the part of a person. Commission of an offence by raising a legal fiction or by creating a vicarious liability in terms of the provisions of a statute must be expressly stated. The Managing Director or the Directors of the Company, thus, cannot be said to have committed an offence only because they are holders of offices. The learned Additional Chief Metropolitan Magistrate, therefore, in our opinion, was not correct in issuing summons without taking into consideration this aspect of the matter. The Managing Director and the Directors of the Company should not have been summoned only because some allegations were made against the Company.

18. In Pepsi Foods Ltd. v. Judicial Magistrate [(1998) 5 SCC 749 : 1998 SCC (Cri) 1400] this Court held as under: (SCC p. 760, para 28)

'28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the

accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.'

19. Even as regards the availability of the remedy of filing an application for discharge, the same would not mean that although the allegations made in the complaint petition even if given face value and taken to be correct in its entirety, do not disclose an offence or it is found to be otherwise an abuse of the process of the court, still the High Court would refuse to exercise its discretionary jurisdiction under Section 482 of the Code of Criminal Procedure."

6. Thus the trial Court committed an illegality by treating the petitioner as an accused and/or framing charge against her as done in the present case.

7. The second issue which arises for consideration is whether in view of the negligence of the pharmacist or the doctor, the company who was running the hospital can be summoned as an accused. This issue also stands covered by the decision of this Court in 171 (201) DLT 198 Indraprastha Medical Corp. Ltd. vs. State (NCT of Delhi) wherein this Court categorically held that for a deliberate or negligent act of the doctor working in the corporation or hospital no criminal negligence or criminal liability can be

fastened on the hospital, dehors the claim for medical negligence. It was held:

4. In Standard Chartered Bank v. Directorate of Enforcement 2005 SCC (Cri.) 961 SC made following observations regarding criminal liability of the Corporation:

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

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

In Kalpnath Rai v. State AIR 1998 (SC) 201 SC made following observations:

The company is not a natural person. We are aware that in many recent penal statutes, companies or corporations are deemed to be offenders on the strength of the acts committed by persons responsible for the management of affairs of such company or corporations e.g. Essential Commodities Act, Prevention of Food Adulteration Act etc. But there is no such provision in TADA which makes the company liable for the acts of its officers. Hence, there is no scope whatsoever to prosecute a company for the offence under Section 3(4) of TADA. The corollary is that the conviction passed against A-12 is liable to be set aside.

In Standard Chartered Bank v. Vinay Kumar Sood and Ors. 2009 (1) JCC 756 this Court had observed as under:

Undisputedly, the petitioner is a bank incorporated in England with limited liability by Royal Charter, 1853 and, therefore, is a corporation/company. A company cannot be in any case held to have committed an offence under Section 500 IPC because; most essential ingredient of the said offence i.e. 'mens rea' would be missing as a company is a juristic entity or an artificial person, whereas a Director is not a company. The company may be made liable for offences, however, if there is anything in the definition or context of a particular

Section or a particular statute which would prevent the application of the said section to a limited company, the limited company cannot be proceeded against. There are number of provisions of law in which it would be physically impossible by a limited company to commit the offence. A limited company, therefore, cannot generally be tried for offences where mens rea is essential. Similarly, a company cannot face the punishment of imprisonment for obvious reasons that company cannot be sent to prison by way of a sentence.

5. The offence of criminal negligence requires a specific state of mind in respect of the person committing the offence. The offence of medical criminal negligence cannot be fastened on the company since the company can neither treat nor operate a patient of its own. It is the Doctor working in the company who treats & performs operations. It is the Doctor who examines the patients and prescribes medicines. If there is a deliberate or negligent act of the Doctor working in the Corporation/Hospital, it is the liability of the Doctor and not of the Corporation for criminal negligence despite the fact that due to the act of the Doctor of treating patients the Corporation was getting some revenue. These days, all Doctors with big hospitals, are on panels where they have fixed fee for examination of patients and for conducting operations. Out of this fee, a percentage is paid to the hospital. The hospital/company cannot be held liable for the personal negligence of the Doctor in giving wrong treatment. However, if there is an administrative negligence, or a negligence of not providing basic infrastructure, which results into some harm to an aggrieved person or such negligence which is impersonal, the hospital can be held liable. But, in the case of medical negligence, which is personal to the Doctor who gave treatment, the Corporation would not be liable and it is the Doctor who can be indicted for medial criminal negligence.

8. The learned Metropolitan Magistrate while summoning the company for framing charge against its Director completely ignored the ratio of the Supreme Court in the decision reported as 2017 (7) SCC 760 Mahendra Singh Dhoni vs. Yerraguntla Shyamsundar held:

13. Before parting with the case, we would like to sound a word of caution that the Magistrates who have been conferred with the power of taking cognizance and issuing summons are required to carefully scrutinise whether the allegations made in the complaint proceeding meet the basic ingredients of the offence; whether the concept of territorial jurisdiction is satisfied; and further whether the accused is really required to be summoned. This has to be treated as the primary judicial responsibility of the court issuing process.

9. The impugned order dated 26th November, 2015 passed by the learned Metropolitan Magistrate summoning the concerned doctor and hospital reads as under:-

*FIR No. 145/10
PS Def. Colony
26.11.2015*

*Present: Ld. APP for the State.
Accused alongwith counsel.
PW4 Ct. Brahm Prakash in person.
PW4 Ct. Brahm Prakash partly examined. His
further examination in chief deferred as no time left.*

An application u/s 319 Cr.P.C. has already been filed by the complainant and forwarded by Ld. APP. In the application, it is stated that on 17.11.2010, the complainant had taken his child for vaccination to Adiva Health Care, 15, Anand Lok, August Kranti Marg, Defence Colony. The complainant paid ₹300/- in cash to the receptionist and was made to sit in a cabin. A child specialist came in the cabin and advised the complainant to take vaccination of 'Infanrix' for

his child and also directed the nurse to bring the same. It is further stated that the said doctor examined the said vaccine and started to vaccinate his child. In the meanwhile, the complainant checked the cover of the vaccine and found that it had already expired. It is stated the said doctor also tried to misled the complainant by stating that there was some misprint on the same vaccine. It is thus, stated that the said doctor and the said nursing home have not been charged by the investigating officer. Therefore, it is prayed that the said accused persons be also summoned in the present matter.

Counsel for the accused has not objected to the said application. The complainant has been partly examined in the present matter on 27.08.2015 and he had reiterated the above said averments made in the application during his examination in chief, even though he had not named the said doctor during his testimony. However, the accused has submitted today that on the date of the incident, Dr. Pankaj was the child specialist, who was on duty and had examined the said child.

Thus, from the evidence placed on record, it appears that Dr. Pankaj, Child Specialist and Adiva Health Care were also prima facie responsible for the said negligent act. In view of the same, issue summons to Dr. Pankaj, Deputed as Child Specialist in Adiva Health Care on 17.11.2010 as well as Director, Adiva Health Care through IO returnable on 04.01.2016.

10. As noted above neither in the investigation nor in the evidence of complainant it has come on record that the Hospital or its directors were involved in the larger conspiracy or that they committed the offence with the requisite mensrea required for offence alleged, further Section 336 IPC does not fall in the category of offences where liability can be fastened on the company or its directors vicariously in the absence of mensrea on their part, as per the requirement of the statute. Consequently, the impugned order of summoning and the proceedings pursuant thereto against the company

ADIVA Health Care or its Director is set aside. Petition and application are disposed of.

(MUKTA GUPTA)
JUDGE

JULY 13, 2018
‘vn’

