

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 07.08.2019	Delivered on 13.08.2019
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CORAM:THE HONOURABLE MR. JUSTICE **N. ANAND VENKATESH**

Crl.OP No.7580 of 2019
and
Crl.MP.Nos.4161 & 4162 of 2019

N.Magesh

..Petitioner

.Vs.

1.State of Tamil Nadu rep.by
Deputy Superintendent of Police,
Economic Offences Wing II,
Admiralty Building,
Govt.Estate, Chennai-600 002.

2.S.Rajendran

..Respondents

PRAYER : Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure, to call for the records in C.C.No.4670 of 2006, on the file of the Chief Metropolitan Magistrate, Egmore, Chennai and quash the same.

For Petitioner : Mr.P.R.Raman

For 1st Respondent : Mr.C.Raghavan

Government Advocate

ORDER

This Criminal Original Petition has been filed seeking to quash the proceedings in C.C.No.4670 of 2006, pending on the file of the learned Chief Metropolitan Magistrate, Egmore.

2.The case of the prosecution is that Alwarpet Benefit Fund Limited, which was a Company engaged in the business of receiving fixed deposits, failed to repay the deposits even after maturity. An FIR was registered based on the complaint given by one of the depositor. In the course of investigation, it was found that 46,000 depositors were defrauded to the tune of Rs.118 crores. The investigation was completed, and a Final Report was filed against 14 accused persons and the petitioner is ranked as A-4. Even though, the Final Report was taken cognizance in the year 2006, the principal accused persons viz; A-1 to A-3 have absconded and are said to be living in a foreign country and are yet to be brought back to India, and therefore there is absolutely no progress in the case for the last 13 years.

3.The petitioner who has been arrayed as A-4, was working as a Director of the Company during the period from 27.02.1997 to 04.07.1999.

4.Mr.V.P.Raman, learned Senior Counsel appearing on behalf of the petitioner submitted that the petitioner is a Chartered Accountant by profession, and he was made as an accused in this case only on the ground that he was one of the Directors in the Company. The learned Senior Counsel submitted that no overt act, has been attributed against the petitioner and the respondent Police have added the petitioner as an accused by merely applying the principle of vicarious liability. The learned Senior Counsel further submitted that the concept of vicarious liability will not apply for IPC offences. The learned Senior Counsel concluded his arguments by submitting that the main accused persons have escaped from the clutches of law, and the petitioner who was a Non-Executive Director and a Chartered Accountant by profession, has been going through the ordeal of facing criminal proceedings without there being any material available against him and the criminal proceeding is an abuse of process of Court, insofar as the petitioner is concerned.

5.The respondent Police have filed a counter affidavit in this case. The relevant portions of the counter affidavit is extracted hereunder:

3.It submitted that I am the Investigating Officer of the case in Cr.No.993/1999 U/s.406, 409,420, 506(ii) r/w 120 (B) IPC. On the Complaint of Tr.Rajendran, (Retd) Chief Engineer, Railways, No. A-87, Annanagar, Chennai-40 a case was registered against the company in EOW cr.993/1999 U/s.406,409,420,506 (ii) r/w 120(b) IPC and the case was Charged on 14.07.2006 before the C.M.M.Court, Egmore, in C.C.No.4670/06, dated 24.08.06. Total defaulted amount is Rs.118 Crores for 46,000 depositors. So far Rs.75.25 Crores was settled to 10,632 depositors as full settlement. For the remaining 35,368 depositors 61% was settlement as part payment (13th installments). The Retd.Justice Tr.Taman was appointed as Administrator in this Company for recovery of dues to the company and for settlements to the depositors.

5.It is submitted that the averments made in Para 3 & 4 are dennied that A4 Magesh was appointed as one of the Director in Alwarpet Benefit Fund Ltd., on

27.02.1997. During the period A-4 acted as a director and attended the Board of Directors meeting and signed in the Minutes and continued as a director till 04.07.1999. As per the Article Association of the company the management shall vested with the Board of Directors. The Board of Directors shall have been sole discretion regarding utilization of the companies fund. The Board of Directors shall empowered to frame rules with the respect various scheme of loans and advances of the company such as those relating to mode of application, the rate of interest or loans, Principle or interest, nature of repayment etc. The Board of Directors shall have powers to frame rules governing the schemes of various deposit accounts such as rate of interest, minimum balance etc.

6.It is submitted that the averments made in Para 5 concerned that, since the investigation revealed that the petitioner was during that period 1997 to 1999, deposits are collected in the name of the company were to the tune of rs.23 Crores and defaulted in returning the same to depositors. There is a prima facie case against the petitioner/accused and therefore he was included as A4 in the Final Report which was taken on file by the Chief Metropolitan Magistrate, Egmore and C.C.No.4670/2006 was assigned.

11.It is submitted that the averments made in Para.10,11,12 & 13 are totally false. There is a sufficient direct and oral as well as documentary evidence to substantiate the offences against petitioner/accused. The petitioner/accused name was

mentioned in the pamphlet issued by the Alwarpet Benefit Fund Ltd., with regard to deposit scheme. The petitioner/accused has also attended the Board of Directors meeting and signed in the minutes of the meeting. Further the petitioner/accused had signed in the Balance Sheet for the period 1996-97, 1997-98. The above facts disclosed the petitioner was involved in the management of the affairs of the company. The petitioner/accused along with the other accused issued pamphlet with the promise to pay 20% interest per annum for the deposit and there by induced depositors to invest their money with the company. The petitioner/accused along with the other accused entered into the conspiracy and deceived the depositors to the tune of Rs.118 Crores to 46,000 depositors. The statements and documentary evidence categorical revealed all the ingredients of sections 406,409,420,506(ii) r/w 34 IPC. Therefore a Final Report is liable to be quashed in this ground.

16.It is submitted that the averments made in Para 21,22,23 & 24 are denied. The petitioner/accused had attended the Board of Directors meeting during the period from 1996-97, 1997-98 and also signed in the minutes. The petitioner/accused had also signed in the Balance Sheet for the above said periods. Since, there is a prima facie case against the petitioner/accused, based on the statements and documents the Hon'ble CMM Court has taken cognizance of the offences U/s.120(B), r/w 420, r/w 34 and 409, r/w 34, 109 IPC. Therefore there is a no question of non application of

mind in taking the cognizance of the case.

6.Mr.C.Ragavan, learned Government Advocate appearing on behalf of the respondent Police, apart from reiterating the facts stated in the counter affidavit, also submitted that the petitioner had attended the meeting of the Board of Directors and also signed in the Balance Sheets during the period 1997-1999, and therefore the petitioner was involved in the management of the affairs of the Company. The learned counsel further submitted that the petitioner by not interfering with the illegal acts committed by A-1 to A-3, had committed breach of his obligation and thereby abetted the crime committed by A-1 to A-3.

7.The learned counsel further submitted that there are *prima facie* materials available against the petitioner in order to frame charges, and therefore this Court should not interfere with the proceedings at this stage, more particularly due to the fact that it involves the interest of thousands of depositors, who were defrauded by the Company.

8.This Court has carefully considered the submissions made on either side and the materials available on record.

9.This case became a very huge scam in the year 1999, wherein thousands of depositors lost their hard earned money, which they had deposited in fixed deposits at Alwarpet Benefit Fund. The counter affidavit filed by the respondent Police shows that 46,000 depositors were defrauded to the tune of Rs.118 crores. In this case, an administrator was appointed by this Court, and as a result of the same, several properties belonging to the Company was brought for sale and several depositors were settled. Unfortunately, in this case the prime accused persons [A-1 to A-3] escaped from India and they were declared as proclaimed offenders. Till today, they have not been brought back to India.

10.At this juncture, it is necessary to find out if there are any materials available against the petitioner, who was functioning as a Director of the Company from 27.02.1997 to 04.07.1999.

11.A reading of the Final Report along with the statement of witnesses and other materials collected by the prosecution, shows

various overt acts against [A-1 to A-3] and certain other accused persons. Originally, the petitioner was ranked as A-5 and due to the death of A-4, during the course of investigation, the petitioner was made as A-4 in the case. The petitioner has not been roped in for any individual offences attributed against the other accused persons. The petitioner has been roped in only for the offence of criminal conspiracy under Section 120B of IPC and for the offence of abetment under Section 109 IPC.

12.The specific averment that was made against the petitioner in the Final Report is extracted hereunder:

The accused [A-4] N.Magesh, Director of the Company in pursuance of the conspiracy as a Director of Alwarpet Benefit Fund Ltd engaging himself with conspiracy illegally committed by intentionally aiding the commission of cheating and criminal breach of trust by A1 to A-3 by his non-interference by illegal omission involving the breach obligation enshrined in the Articles of Association and thus appear to committed an offence of abatement u/s 109 IPC.

13.In the counter affidavit, it has been stated that the petitioner had attended the meeting of the Board of Directors and had

also signed in the Balance Sheet of the Company for the period from 1997 to 1999. Therefore, the prosecution has come to a conclusion that the petitioner is involved in the day-to-day affairs of the Company, and therefore he is also a link in the chain of conspiracy, along with the other accused persons.

14.It is important to note that the Final Report has been filed for IPC offences against the accused persons. The Penal Code does not contemplate any vicarious liability on a party, who is not charged directly for the commission of an offence. The concept of vicarious liability is created by legal fiction only where it is specifically provided under a statute. Useful reference can be made in this regard, to the Judgment of the Hon'ble Supreme Court in **Sunil Bharti Mittal .Vs. Central Bureau of Investigation** reported in **(2015) 1 MLJ (Crl) 231 (SC)**. The relevant portions of the judgment is extracted hereunder:

18.The neat submission of Mr. Salve was that the aforesaid reason given by the learned Special Judge was clearly erroneous in law. Expanding this argument, he submitted that principle of "alter ego" has always been applied in reverse, inasmuch as general principle is that the acts of individual, who is in control of the affairs of a company and is a directing mind, are

attributed to the company, inasmuch as whenever such a person, who is controlling the affairs of the company, is made an accused, on the application of the principle of "alter ego", the company can also be implicated as accused person. It is on the well recognised principle that company does not act of its own but through its Directors/Officers and when such Directors/Officers act on behalf of the company, the company is also held liable for those acts on the application of "principal - agent" principle. He submitted that it has never been a case where for the act of the company, an individual is made accused, unless there is a categorical provision in the statute making such a person vicariously liable or there is enough material to attribute the alleged acts of criminality to the said person. For his aforesaid submissions, he placed heavy reliance upon the decision of this Court in [Iridium India Telecom Ltd. v. Motorola Inc](#)[2]. He further submitted that merely on the basis of the appellant's status in the company, it could not be presumed that it is the appellant who became a party to the alleged conspiracy, as was held in [Maharashtra State Electricity Distribution Co. Ltd. v. Datar Switchgear Ltd.](#)[3] in the following manner:

"27. A bare perusal of the complaint shows that the gravamen of the allegation is that a fabricated document containing the offending endorsement was tendered in evidence before the Arbitral Tribunal on behalf of MSEB by Accused 6, who was in charge of Shirpur Section. It is evident from the aforeextracted

paragraphs of the complaint that other accused have been named in the complaint because, according to the complainant, MSEB, Accused 1 was acting under their control and management. It bears repetition that the only averment made against Appellant 2 is that Appellant 1 i.e. MSEB was acting under the control and management of Appellant 2 along with other three accused. There is no denying the fact that Appellant 2 happened to be the Chairman of MSEB at the relevant time but it is a settled proposition of law that one cannot draw a presumption that a Chairman of a company is responsible for all acts committed by or on behalf of the company. In the entire body of the complaint there is no allegation that Appellant 2 had personally participated in the arbitration proceedings or was monitoring them in his capacity as the Chairman of MSEB and it was at his instance that the subject interpolation was made in Ext. C-64.

xx xx xx In this regard, it would be useful to advert to the observations made by a three-Judge Bench of this Court in S.M.S. Pharmaceuticals (2005)8 SCC 89: (SCC p. 98, para 8) "8. ... There is no universal rule that a Director of a company is in charge of its everyday affairs. We have discussed about the position of a Director in a company in order to illustrate the point that there is no [pic]magic as such in a particular word, be it Director, manager or secretary. It all depends upon the respective roles assigned to the officers in a company. A company may have managers or secretaries for different departments, which means, it

may have more than one manager or secretary."

Mr. Salve also referred to the following observations in [S.K. Alagh v. State of U.P.](#) Air 2008 SC 1731 : (2008) 5 SCC 662 : LNIND 2008 SC 368: (2008) 1 MLJ (CrI) 1360

"12. The short question which arises for consideration is as to whether the complaint petition, even if given face value and taken to be correct in its entirety, disclosed an offence as against the appellant under [Section 406](#) of the Penal Code.

xx xx xx

19. As, admittedly, drafts were drawn in the name of the Company, even if the appellant was its Managing Director, he cannot be said to have committed an offence under [Section 406](#) of the Penal Code. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor. In absence of any provision laid down under the statute, a Director of a Company or an employee cannot be held to be vicariously liable for any offence committed by the Company itself. (See [Sabitha Ramamurthy v. R.B.S. Channabasavaradhya](#), (2006) 10 SCC 581."

Reliance was also placed on the decision in the case of [Aneeta Hada v. Godfather Travels & Tours \(P\) Ltd.](#) AIR 2012 SC 2795: (2012) 5 SCC 661: LNIND 2012 SC 260, with particular emphasis on the following passage:

"32. We have referred to the aforesaid authorities to highlight that the company can have criminal liability and further, if a group of persons that guide the business of the companies have the criminal intent, that would be imputed to the body corporate. In this

backdrop, [Section 141](#) of the Act has to be understood. The said provision clearly stipulates that when a person which is a company commits an offence, then certain categories of persons in charge as well as the company would be deemed to be liable for the offences under [Section 138](#). Thus, the statutory intendment is absolutely plain. As is perceptible, the provision makes the functionaries and the companies to be liable and that is by deeming fiction. A deeming fiction has its own signification."

32. The moot question is whether the aforesaid proposition, to proceed against the appellants is backed by law? In order to find the answer, let us scan through the case law that was cited during the arguments.

33. First case which needs to be discussed is *Iridium India (supra)*. Before we discuss the facts of this case, it would be relevant to point out that the question as to whether a company could be prosecuted for an offence which requires mens rea had been earlier referred to in a Constitution Bench of five Judges in the case of [Standard Chartered Bank v. Directorate of Enforcement](#)[11]. The Constitution Bench had held that a company can be prosecuted and convicted for an offence which requires a minimum sentence of imprisonment. In para 8 of the judgment, the Constitution Bench clarified that the Bench is not expressing any opinion on the question whether a corporation could be attributed with requisite mens rea to prove the guilt. Para 8 reads as under:

"8. 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."

34.*In Iridium India (supra), the aforesaid question fell directly for consideration, namely, whether a company could be prosecuted for an offence which requires mens rea and discussed this aspect at length, taking note of the law that prevails in America and England on this issue. For our benefit, we will reproduce paras 59, 60, 61, 62, 63 and 64 herein:*

"59. The courts in England have emphatically rejected the notion that a body corporate could not commit a criminal offence which was an outcome of an act of will needing a particular state of mind. The aforesaid notion has been rejected by adopting the doctrine of attribution and imputation. In other words, the criminal intent of the "alter ego" of the company/body corporate i.e. the person or group of persons that guide the business of the company, would be imputed to the corporation.

*60.**It may be appropriate at this stage to notice the observations made by MacNaghten, J. in Director of Public Prosecutions v. Kent and Sussex Contractors Ltd. 1972 AC 153: (AC p. 156):*

"A body corporate is a "person" to whom, amongst the various attributes it may have, there should be imputed the attribute of a mind capable of

knowing and forming an intention - indeed it is much too late in the day to suggest the contrary. It can only know or form an intention through its human agents, but circumstances may be such that the knowledge of the agent must be imputed to the body corporate. Counsel for the respondents says that, although a body corporate may be capable of having an intention, it is not capable of having a criminal intention. In this particular case the intention was the intention to deceive. If, as in this case, the responsible agent of a body corporate puts forward a document knowing it to be false and intending that it should [pic]deceive, I apprehend, according to the authorities that Viscount Caldecote, L.C.J., has cited, his knowledge and intention must be imputed to the body corporate."

61. The principle has been reiterated by Lord Denning in *Bolton (H.L.) (Engg.) Co. Ltd. v. T.J. Graham & Sons Ltd.* in the following words: (AC p. 172):

"A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is

treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. That is made clear in Lord Haldane's speech in Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd. (AC at pp. 713, 714). So also in the criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or the managers will render the company themselves guilty."

62. The aforesaid principle has been firmly established in England since the decision of the House of Lords in *Tesco Supermarkets Ltd. v. Nattrass*. In stating the principle of corporate liability for criminal offences, Lord Reid made the following statement of law: (AC p. 170 E-G)

"I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks

through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability."

63. From the above it becomes evident that a corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring mens rea. The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons. The position of law on this issue in Canada is almost the same. Mens rea is attributed to corporations on the principle of "alter ego" of the company.

64. So far as India is concerned, the legal position has been clearly stated by the Constitution Bench judgment of this Court in [Standard Chartered Bank v. Directorate of Enforcement](#) (2005) 4 SCC 530 . On a detailed consideration of the entire body of case laws in this country as well as other jurisdictions, it has

been observed as follows: (SCC p. 541, para 6) "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."

35.*It is abundantly clear from the above that the principle which is laid down is to the effect that the criminal intent of the "alter ego" of the company, that is the personal group of persons that guide the business of the company, would be imputed to the company/corporation. The legal proposition that is laid down in the aforesaid judgment is that if the person or group of persons who control the affairs of the company commit an offence with a criminal intent, their criminality can be imputed to the company as well as they are "alter ego" of the company.*

36.*In the present case, however, this principle is applied in an exactly reverse scenario. Here, company is the accused person and the learned Special Magistrate has observed in the impugned order that since the appellants represent the directing mind and will of each company, their state of mind is the state of mind of the company and, therefore, on this premise, acts of the*

company is attributed and imputed to the appellants. It is difficult to accept it as the correct principle of law. As demonstrated hereinafter, this proposition would run contrary to the principle of vicarious liability detailing the circumstances under which a direction of a company can be held liable.

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

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

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

39.*When the company is the offender, vicarious liability of the Directors cannot be imputed automatically, in the absence of any statutory provision*

to this effect. One such example is Section 141 of the Negotiable Instruments Act, 1881. In *Aneeta Hada (supra)*, the Court noted that if a group of persons that guide the business of the company have the criminal intent, that would be imputed to the body corporate and it is in this backdrop, Section 141 of the Negotiable Instruments Act has to be understood. Such a position is, therefore, because of statutory intendment making it a deeming fiction. Here also, the principle of "alter ego", was applied only in one direction namely where a group of persons that guide the business had criminal intent, that is to be imputed to the body corporate and not the vice versa. Otherwise, there has to be a specific act attributed to the Director or any other person allegedly in control and management of the company, to the effect that such a person was responsible for the acts committed by or on behalf of the company. This very principle is elaborated in various other judgments. We have already taken note of *Maharashtra State Electricity Distribution Co. Ltd. (supra)* and *S.K. Alagh (supra)*. Few other judgments reiterating this principle are the following:

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15.It is also important to take note of the fact that the petitioner is a Chartered Account, by profession and he was a Non-Executive Director of the Company. At this juncture, it will be useful to take note of the judgment of the Hon'ble Supreme Court in

Chintalapati Srinivasa Raju and Others .Vs. Securities and Exchange Board of India, reported in **(2018 5 MLJ 857)**. The relevant portions of the judgment is extracted hereunder:

16. In Pooja Ravinder Devidasani v. State of Maharashtra (2014) 16 SCC 1 at 9, it is stated:

"17. There is no dispute that the appellant, who was wife of the Managing Director, was appointed as a Director of the Company— M/s Elite International (P) Ltd. on 1-7-2004 and had also executed a letter of guarantee on 19-1-2005. The cheques in question were issued during April 2008 to September 2008. So far as the dishonour of cheques is concerned, admittedly the cheques were not signed by the appellant. There is also no dispute that the appellant was not the Managing Director but only a non-executive Director of the Company. Non-executive Director is no doubt a custodian of the governance of the company but is not involved in the day-to-day affairs of the running of its business and only monitors the executive activity. To fasten vicarious liability under Section 141 of the Act on a person, at the material time that person shall have been at the helm of affairs of the company, one who actively looks after the day-to-day activities of the company and is particularly responsible for the conduct of its business. Simply because a person is a Director of a company, does not make him liable under the NI Act. Every person connected with the Company will not fall into the ambit of the provision. Time and again, it has

been asserted by this Court that only those persons who were in charge of and responsible for the conduct of the business of the Company at the time of commission of an offence will be liable for criminal action. A Director, who was not in charge of and was not responsible for the conduct of the business of the Company at the relevant time, will not be liable for an offence under Section 141 of the NI Act. In National Small Industries Corpn. [National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal, (2010) 3 SCC 330 : (2010) 1 SCC (Civ) 677 : (2010) 2 SCC (Cri) 1113] this Court observed: (SCC p. 336, paras 13-14) "13. Section 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent 1 was in charge of or was responsible to the accused Company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability.

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." Non-executive directors are, therefore, persons who are not involved in the day to day affairs of the running of the company and are not in charge of and not responsible for the conduct of the business of the company.

17.An instructive judgment of Lord Halsbury is contained in Dovey and the Metropolitan Bank v. John Cory [1901] AC 477. The Lord Chancellor put it thus:

"The charge of neglect appears to rest on the assertion that Mr. Cory, like the other directors, did not attend to any details of business not brought before them by the general manager or the chairman, and the argument raises a serious question as to the responsibility of all persons holding positions like that of directors, how far they are called upon to distrust and be on their guard against the possibility of fraud being committed by their subordinates of every degree. It is obvious if there is such a duty it must render anything like an intelligent devolution of labour impossible. Was Mr. Cory to turn himself into an auditor, a managing director, a chairman, and find out whether auditors, managing directors, and chairmen were all alike deceiving him? That the letters of the auditors were kept from him is clear. That he was assured that provision had been made for bad debts, and that he believed such assurances, is involved in the admission that he was guilty of no moral fraud; so that it comes to this, that he ought to have discovered a network of conspiracy and

fraud by which he was surrounded, and found out that his own brother and the managing director (who have since been made criminally responsible for frauds connected with their respective offices) were inducing him to make representations as to the prospects of the concern and the dividends properly payable which have turned out to be improper and false. I cannot think that it can be expected of a director that he should be watching either the inferior officers of the bank or verifying the calculations of the auditors himself. The business of life could not go on if people could not trust those who are put into a position of trust for the express purpose of attending to details of management. If Mr. Cory was deceived by his own officers - and the theory of his being free from moral fraud assumes under the circumstances that he was - there appears to me to be no case against him at all. The provision made for bad debts, it is well said, was inadequate; but those who assured him that it was adequate were the very persons who were to attend to that part of the business; and so of the rest. If the state and condition of the bank were what was represented, then no one will say that the sum paid in dividends was excessive. (at pages 485-86) Per Lord Davey, it was held:

"In this state of the evidence, my Lords, I ask whether the course of business at the board meetings, as described by the respondent, was a reasonable course to be pursued by the respondent and other directors, or whether the knowledge which might have been derived from a careful and comparative examination of the

weekly states and quarterly returns from the different branches of the bank ought to be imputed to the respondent, or (alternatively) whether he was guilty of such neglect of his duty as a director as would render him liable to damages. I do not think that it is made out that either of the two latter questions should be answered in the affirmative. I think the respondent was bound to give his attention to and exercise his judgment as a man of business on the matters which were brought before the board at the meetings which he attended, and it is not proved that he did not do so. But I think he was entitled to rely upon the judgment, information, and advice of the chairman and general manager, as to whose integrity, skill, and competence he had no reason for suspicion. I agree with what was said by Sir George Jessel in Hallmark's Case, and by Chitty J. in In re Denham & Co., that directors are not bound to examine entries in the company's books. It was the duty of the general manager and (possibly) of the chairman to go carefully through the returns from the branches, and to bring before the board any matter requiring their consideration; but the respondent was not, in my opinion, guilty of negligence in not examining them for himself, notwithstanding that they were laid on the table of the board for reference. The case is no doubt one of some difficulty, but the appellant has not made out to my satisfaction that the respondent wilfully (as that term is explained in the cases I have referred to) misappropriated the company's funds in payment of dividends." (at pages 492-493)

18.It is also important to note that the appellant attended only six out of ten board meetings of SCSL for the period that he was a non-executive director. The appellant was not involved in any business development, diversification plans and advise on new ventures of SCSL post 1999. It was also held by the minority judgment that the findings of the Whole Time Member and the majority went clearly beyond the show cause notice, which, when read with Annexure 15 thereof, makes it clear that the appellant is only sought to be roped in as a promoter. Once it is found that he is not a promoter, then the basis of the show cause notice goes as also the basis of the impugned judgment.

16.From the above judgments, it is clear that even though the corporate entity is an artificial person which acts through its Officers, Directors, Chairman etc., if such a Company commits an offence involving *mens rea*, it would normally be the intent and action of that individual, who acted on behalf of the Company. A person, who has perpetrated the commission of an offence on behalf of a Company can be made as an accused, along with the Company, if there is sufficient evidence of his **active role coupled with criminal intent** [emphasis supplied]. This is the cardinal principle of criminal jurisprudence, unless the statute specifically provides for the

applicability of the doctrine of vicarious liability like in the case of Negotiable Instruments Act, 1881, Employees Provident Fund Act, 1952, Food Safety and Standards Act, 2006, etc.

17. In case of a Non-Executive Director, they cannot be presumed to be involved in the day-to-day affairs of the running of the Company and they cannot be made liable just because they have attended Board Meetings or signed Balance Sheets.

18. In the instant case, the only allegation that is found against the petitioner in the Final Report and in the materials collected by the prosecution during the course of investigation, is that the petitioner did not interfere with the illegal act committed by A-1 to A-3, and thereby he has abetted the commission of crime under Section 109 of IPC. Therefore, the prosecution has proceeded against the petitioner more on an assumption and by applying the principle of vicarious liability, without there being any material to show that the petitioner had perpetrated the commission of the offence, by playing an active role coupled with criminal intent. Unless, this minimum requirement is satisfied, the petitioner cannot be made as an accused in this case.

19. Even to rope in the petitioner under Section 109 of IPC, the prosecution must establish the element of *mens rea* and a positive act on the part of the petitioner. Negligence or carelessness or even facilitation cannot be termed to be abetment and abetment is not a matter of mere suspicion or surmises. Therefore, even if the entire materials are taken as it is, along with the allegations made in the Final Report, this Court does not find even an iota of evidence against the petitioner to rope him for the offence of abetment.

20. In the considered view of this Court, there are no materials available against the petitioner to proceed further against him before the Court below. It is true that even a strong suspicion is enough to frame charges against an accused person. If material is available, this Court cannot go into it and analyse such materials at this stage. However, such a suspicion must be based on some material and not on mere assumptions or surmises. In this case, no material is available against the petitioner.

21. In view of the above, the continuation of the

proceedings against the petitioner is an abuse of process of Court and in the considered view of this Court, the petitioner should not be made to face the ordeal of trial before the Court below. This Court has no hesitation to quash the proceedings insofar as the petitioner is concerned.

22.In the result, the proceedings in C.C.No.4670 of 2006, on the file of the learned Chief Metropolitan Magistrate, Egmore, Chennai, is hereby quashed insofar as the petitioner is concerned. Accordingly, this Criminal Original Petition is allowed. Consequently, connected miscellaneous petitions are closed.

13.08.2019

Index : Yes
Internet : Yes
Speaking Order/Non Speaking order
KP

सत्यमेव जयते
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To

1.The Deputy Superintendent of Police,
Economic Offences Wing II,
Admiralty Building,
Govt.Estate, Chennai-600 002.

2.The Chief Metropolitan Magistrate,
Egmore.

3.The Public Prosecutor,
High Court, Madras.

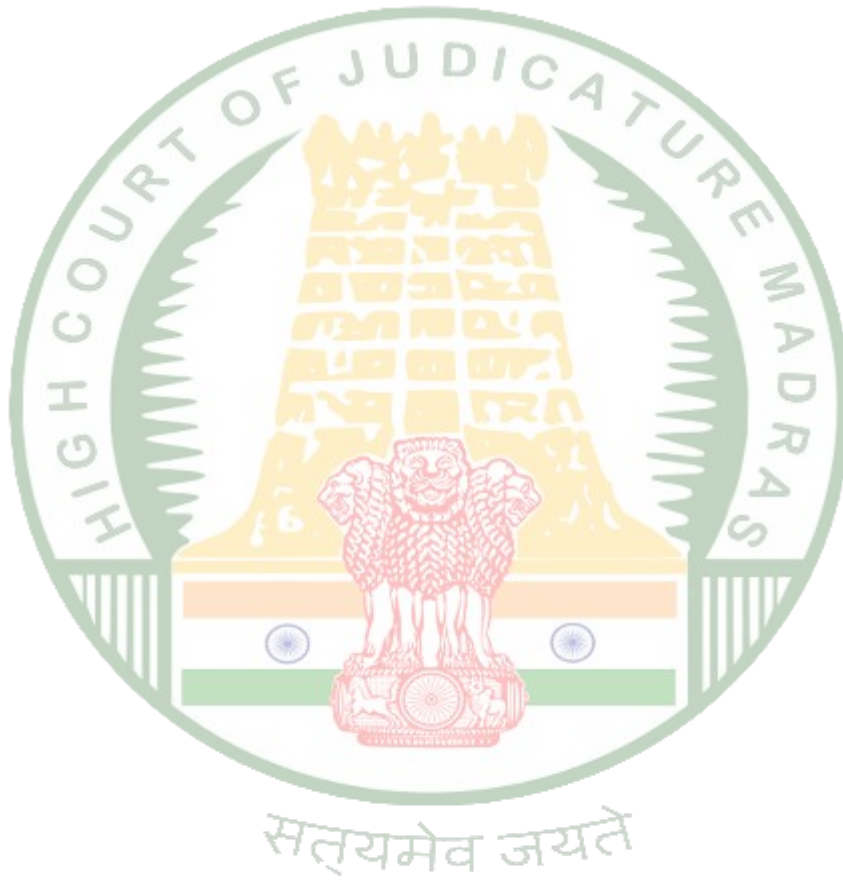


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N. ANAND VENKATESH,, J.

KP

**Crl.OP No.7580 of 2019****WEB COPY****Delivered on: 13.08.2019**



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