

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

Date of decision: 23rd December, 2021

IN THE MATTER OF:

+ **CRL.M.C. 2163/2012**

CHARU MOTORS PVT LTD & ANR

..... Petitioners

Through Mr. Vipin Singhanian, Ms. Shivangani
Gupta, Advocates

versus

PEGASUS COMPUTERS & ORS

..... Respondents

Through Mr. Rajat Aneja with Ms. Aparna
Shukla, Advocates for the respondent
No.1

Mr. Kirti Uppal, Sr. Advocate with
Mr. Sundeep Srivastava, Mr. Paran
Kumar, Ms. Riya Gulati, Advocates
for the respondents No.2-3

Ms. Meenakshi Chauhan, APP for the
State with SI Ravinder Kumar, PS
Naraina

+ **CRL.M.C. 2324/2012**

KOTAK MAHINDRA PRIME LTD. & ORS

..... Petitioners

Through Mr. Kirti Uppal, Sr. Advocate with
Mr. Sundeep Srivastava, Mr. Paran
Kumar, Ms. Riya Gulati, Advocates

versus

STATE & ORS

..... Respondents

Through Ms. Meenakshi Chauhan, APP for the
State with SI Ravinder Kumar, PS
Naraina

Mr. Rajat Aneja with Ms. Aparna
Shukla, Advocates for the respondent
No.2

Mr. Vipin Singhania, Ms. Shivangani
Gupta, Advocates for the respondents
No.3 & 4

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. CRL.M.C. 2163/2012 & CRL.M.C. 2324/2012 are for quashing order dated 23.04.2012 passed by the learned Metropolitan Magistrate in Complaint Case No.103/2010.
2. It is pertinent to mention here that Charu Motors (Petitioner No.1 in CRL.M.C. 2163/2012 & Respondent No.3 in CRL.M.C. 2324/2012) is a company authorized for selling and servicing of four wheelers manufactured by M/s Hans Hyundai. Petitioner No.2 in CRL.M.C. 2163/2012 is the Director of Charu Motors. Kotak Mahindra Primus Limited (Petitioner No.1 in CRL.M.C. 2324/2012 & Respondent No.2 in CRL.M.C. 2163/2012) is a Non-Banking Financial Company (*hereinafter*, 'the Bank'), Uday Kotak (Petitioner No.2 in CRL.M.C. 2324/2012 & Respondent No.3 in CRL.M.C. 2163/2012) is the Chairman of Kotak Mahindra Primus Limited, and Sumit Bali (Petitioner No.3 in CRL.M.C. 2324/2012 & Respondent No.4 in CRL.M.C. 2163/2012).
3. Facts, in brief, leading to the present petitions are as under:
 - a) On 25.01.2001, Respondent No.1 in CRL.M.C.2163/2012, who is the same as Respondent No.2 in CRL.M.C.2324/2012, (*hereinafter*, 'the Complainant') purchased one Hyundai Santro car for a on-road cost of Rs. 4,09,047.00/-. It is stated that out of the said sum, a sum of Rs. 2,52,750/- was financed from Kotak Mahindra Primus Limited which was to be repaid over 47

months in equal monthly instalments (EMI) of Rs.6,962/- each, and that the margin money was Rs. 1,37,950/-. It is stated that the Complainant was also liable to pay overdue interest and other charges. Accordingly, the Hyundai Santro vehicle was purchased, and as per the terms of the loan agreement dated 08.02.2001, the vehicle was hypothecated by the Complainant in favour of the Bank.

- b) It is stated that the first EMI was due on 15.03.2001, however, upon depositing the cheque, the same was returned on account of “Stop Payment” issued by the Complainant. It is stated by the Bank that it has not received any amount paid from the Complainant against the loan.
- c) It is stated that the Complainant claims to have issued 48 post-dated instruments to the Bank, and the Bank, without his knowledge or consent, extended one of the 48 post-dated instruments to Charu Motors (*hereinafter*, ‘the Dealer’), which was encashed by the Dealer followed by the Bank unilaterally increasing the loan sum from Rs.2,50,000/- to Rs. 2,52,750/-. It is stated that the Complainant further claims to have written communications to the Bank and the Dealer herein (dated 05.03.2001, 27.03.2001 and 28.03.2001), calling upon them to explain the said discrepancy, but to no avail.
- d) It is further stated that the Complainant claims that the Bank illegally terminated the loan agreement before presentation of second instrument towards monthly instalments and further allegedly called upon the Complainant *vide* Notice dated

17.03.2001 to pay a sum for Rs. 2,68,494/- within twenty-fours from date and time of receipt thereof.

- e) It is stated that on account of default of payment, the subject vehicle was repossessed by the Bank on 04.04.2001. It is stated that consequently, the Complainant lodged a complaint on 07.04.2001, being FIR No.116/2001 dated 29.05.2001 registered at Police Station Naraina under Section 379 IPC. A legal notice dated 07.04.2001 was also sent by the Complainant simultaneously. It is stated that in April 2001, Civil Suit bearing No. 155/2001 was filed by the Complainant, and the same was withdrawn *vide* Order dated 24.04.2001 on the ground of statement of the Complainant wherein it was stated that the Complainant was ready to pay a sum of Rs. 2,75,000/- on or before 28.04.2001 in order for the Petitioners to give back the repossessed vehicle. The Order further stated that if the Complainant did not pay the sum, then he would have to forfeit his right on the vehicle.
- f) It is stated that the Complainant did not pay the amount on or before 28.04.2001 on the ground that the vehicle was in a damaged condition. It is stated that thereafter, an application for review of the Order dated 24.04.2001 was moved, which was dismissed *vide* Order dated 06.04.2011. An appeal against this Order dated 06.04.2011 before this Court was also dismissed *vide* Order dated 24.07.2014.
- g) It is stated a complaint to SHO, P.S. Naraina was also made on 21.04.2001. It is stated that the Police filed a Cancellation

Report in FIR No.116/2001 on 20.08.2002 stating that Section 379 IPC was not attracted, against which the Complainant filed a Protest Petition on 26.06.2004 in the form of a Reply with the following prayers: (i) to add Sections 345/446/448/506/420 IPC in FIR No.116/2001 P.S. Naraina, New Delhi, and (ii) to take immediate action against the accused persons. *Vide* Order dated 05.07.2004, the Ld. M.M. directed for further investigation and noted that, even though Section 379 IPC was not attracted, however, the remaining two offences of criminal assault and criminal intimidation required further investigation. It is to be noted that the Ld. M.M. did not deem it necessary to entertain the prayer in the Protest Petition seeking adding of new offences.

- h) It is stated that thereafter, investigation was conducted and a second Cancellation Report dated 24.04.2005 was filed by the Police, against which a second Protest Petition dated 31.08.2005 was filed by the Complainant, seeking for the Banker, the Dealer, and for members of the repossession team of the Banker to be summoned, tried and punished in accordance with law for commission of offences under Sections 356 / 341 / 342 / 392 / 403 / 406 / 420 / 427 / 451 / 468 / 471 / 506 / 120B IPC. *Vide* Order dated 28.09.2005, the Ld. M.M. directed for the protest petition to be treated as a complaint. The Complainant filed a revision petition against the said Order, however, the same was withdrawn *vide* Order dated 27.04.2006. It is stated that on 19.05.2006, in pursuance of his remedies, the Complainant and

his wife were examined. It is stated that *vide* Order dated 14.09.2006, the Ld. M.M. dismissed the Complaint/Protest Petition of the Complainant, stating that the same lacked sufficient positive material to proceed further against the accused, and therefore, accepted the Cancellation Report. It is stated that the complainant thereafter filed a Revision Petition before the Court of Sessions which was also dismissed *vide* Order dated 29.07.2008.

- i) It is stated that a second complaint dated 30.09.2008 was filed by the Complainant wherein it was averred that the second complaint had nothing to do with FIR No.116/2001 (arising out of the first complaint), and that this complaint was limited to the offence of cheating and criminal breach of trust. It is stated that the Complainant also filed an application under Section 91 Cr.P.C. wherein the Ld. M.M. directed the Petitioners herein to produce the documents sought by the Complainant, and thereafter, issued warrants for production of the documents. It is stated that the Ld. M.M. took cognizance of the Complaint and, *vide* Order dated 23.04.2012, was pleased to issue summons for offences under Sections 409/420/120B to the Bank, Uday Kotak and Sumit Bali, and summons for offences under Sections 403/120B to the Dealer and its Director.
- j) It is stated that aggrieved by the summoning Orders dated 23.04.2012, the Petitioners have approached this Court by way of the instant petitions.

4. Mr. Kirti Uppal, learned Senior Counsel appearing for the Petitioners No. 1, 2 & 3 in CRL. M.C. 2324/2012 and for Respondents No.2, 3 & 4 in CRL.M.C.2163/2012, submits that the first complaint was filed on 07.04.2001, along with a legal notice being issued to the Petitioners. He submits that Uday Kotak is an individual who is worth crores and it would be preposterous to state that he is involved in day-to-day affairs of a particular branch of the Bank or he would oversee all the instalments in each case by each branch of the Bank. He submits that there is nothing in the complaint against Uday Kotak and Sumit Bali, and that the allegations are vague in nature. He submits that in order to launch prosecution against them, specific averments should be made with regard to the role which is attributed to each of them and that a person cannot be made liable for an offence merely for the reason of his official position. The learned Senior Counsel relies upon Maksud Saiyed v. State of Gujarat, (2008) 5 SCC 668 to submit that there is no provision in the IPC for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company, and that it is obligatory on the part of the Complainant to make specific allegations against the said Directors.

5. Mr. Uppal, learned Senior Counsel for the Bank, Uday Kotak and Sumit Bali, submits that the present complaint is false, frivolous and is merely a means to extort pecuniary benefits from the Bank and its Directors/officers. He further submits that the criminal complaint is an abuse of the process of law and should not be entertained as the allegations are inherently improbable, vague and manifestly *malafide*. He further submits that the allegations in the complaint fail to make out a case of commission of offence in terms envisaged by Section 403 of the Penal Code. He submits

that the role of the officer in commission of an offence has to be specifically mentioned and that omnibus averments will not suffice.

6. With regard to the summoning Orders dated 23.04.2012 passed by the learned Metropolitan Magistrate, the learned Senior Counsel submits that an application under Section 91 Cr.P.C had earlier been filed by the Complainant wherein the learned Metropolitan Magistrate *vide* Order dated 13.04.2011 had allowed the same without appreciating the facts and circumstances of the instant case, and had directed the Bank to produce the documents that had been sought for in the complaint. He submits that on the basis of supporting documents and the testimony of the Complainant, the learned Metropolitan Magistrate held that he was *prima facie* satisfied that the Petitioners herein were involved a criminal conspiracy with each other and had deceived the Complainant. The learned Senior Counsel further submits that the summoning Orders suffer from complete legal infirmity as a reading of the complaint does not disclose any offence committed by the Petitioners. He submits that no payment has been received by the Bank and that the first payment was made to the Dealer itself. He submits that even the legal notice which was sent on behalf of the Complainant does not make out any offence and it shows that there was no money which had been misappropriated by the Petitioners and, therefore, no question of wrongful loss being caused to the complainant can arise.

7. Mr. Uppal, learned Senior Counsel, further submits that in the legal notice dated 27.04.2001, it is stated that the Complainant had issued the following cheques in favour of M/s Charu Motors: Cheque No. 314249 dated 30.01.2001 for Rs. 25,065/-, Cheque No. 314777 dated 23.01.2001 for Rs. 1,15,357/-, Cheque No. 304778 dated 23.01.2001 for Rs. 6,625/-, Cheque

No. 314248 dated 23.01.2001 for Rs. 6,962/-, whereas in the Complaint and the statement the Complainant has mentioned that the cheque which was given for the first EMI of Rs. 6962/- was also handed over by the Bank to the Dealer. He submits that this improvisation is a means to falsely implicate the Petitioners. He further submits that the Petitioner has not received any amount from the Complainant and that it was only when the first EMI became due that the Complainant stopped payments. He submits that the instant dispute is with regard to the excess payment made to the dealer of cars and, therefore, it cannot be used as a means to pressurize the Bank.

8. Mr. Uppal, learned Senior Counsel, submits that the summoning Order was issued without any application of judicial mind as the learned Metropolitan Magistrate had failed to appreciate that though the Complainant had stated that the allegations were not related to FIR No.116/2001, however, a reading of the contents of the instant criminal complaint indicates that the contents of FIR No.116/2001 as well as the contents of the instant criminal complaint are the same. Mr. Uppal states that taking cognizance of a second complaint on the same issue contravenes the principles laid down in T.T. Antony v. State of Kerala, (2001) 6 SCC 181. Mr. Uppal relies on the judgements of Amitbhai Anilchandra Shah v. Central Bureau of Investigation and Anr., (2013) 6 SCC 348 and Krishna Lal Chawla and Ors. v. State of Uttar Pradesh and Anr., (2021) 5 SCC 435 to submit that a second FIR, not being a cross FIR, in respect of an offence or different offences committed in the course of the same transaction is not permissible and violates Article 21 of the Constitution of India. He submits that the learned Metropolitan Magistrate has failed to appreciate that a closure report had already been filed after investigation in FIR No.116/2001.

He states that the closure report filed by the Police had been accepted by way of dismissal of the Complainant's Protest Petition. He further informs the Court that a revision petition had also been filed by the Complainant against the Order of the Ld. M.M. in FIR No.116/2001 accepting the closure report and that had also been dismissed.

9. Mr. Uppal, learned Senior Counsel, submits that the summons which were issued to the Petitioners had been done in a criminal manner without appreciating the facts and circumstances of the instant case, and that the Complainant has painted a civil dispute as being a criminal one in order to extort money. Mr. Uppal cites Sunil Bharti Mittal v. Central Bureau of Investigation, (2015) 4 SCC 609, to state that process against the accused can only be issued if the Ld. M.M. is of the view that there is a *prima facie* case and that there exists sufficient ground for proceeding. Further, he states that a person ought not to be dragged into Court merely because a complaint has been filed. He submits that these proceedings are an attempt of the Complainant to force the Bank into arriving at a settlement to recover the money that is owed by the Complainant to the Bank. He relies on the judgments of the Supreme Court in Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre and Ors. (1998) 1 SCC 692, and Indermohan Goswami v. State of Uttaranchal, (2007) 12 SCC 1, to contend that it is the legal duty of the Court to consider whether any useful purpose would be served by allowing a criminal prosecution to continue if the Court, while taking into consideration the special facts of a case, also quashes the proceeding even though it may be at a preliminary stage. He, therefore submits that no useful purpose would be served by allowing a criminal prosecution to continue against the Petitioners, especially in view of the fact

that there is no chance of any conviction of the Petitioner. He, therefore, argues that the criminal complaints must be quashed.

10. Mr. Vipin Singhania, learned Counsel appearing for Charu Motors and its Director, at the outset states that he adopts the submissions extended by Mr. Kirti Uppal, learned Senior Counsel. Mr. Singhania submits that there are no allegations against the Director of Charu Motors, to the extent that the Complaint does not even mention the name of the Director. He submits that the allegation of misappropriation is false as the cheque that had been deposited by the Complainant has been given to Charu Motors itself and, therefore, the question of misappropriation cannot arise. He states that, therefore, the offence under Section 403 IPC is not made out.

11. Mr. Rajat Aneja, learned Counsel appearing for the Complainant, submits that the factual narrative cannot be ignored in the instant case, and that in a criminal case, the thrust is in the allegations. He submits that the two complaints, i.e. Complaint filed on 07.04.2001 which led to FIR No.116/2001, and Complaint dated 30.09.2008, are both distinct from each other, and that the latter, which deals with cheating and criminal breach of trust by way of misappropriation, is not related to the former, which deals with theft, criminal intimidation and assault. He, therefore, submits that the principles enumerated in T.T. Antony (supra) are not attracted in the instant case.

12. Mr. Aneja, learned Counsel for the Complainant, relies upon Poonam Chand Jain and Anr. v. Fazru, **AIR 2010 SC 659**, to submit that there is no blanket bar on the institution of a second complaint on the same facts. He states that a second complaint on the same facts can be entertained in exceptional circumstances, viz. (a) where the previous order was passed on

incomplete record (b) or on a misunderstanding of the nature of the complaint (c) or the order which was passed was manifestly absurd, unjust or foolish or (d) where new facts which could not, with reasonable diligence, have been brought on record in the previous proceedings. Mr. Aneja submits that the second complaint wherein the impugned summoning orders were issued has been rendered by taking all the facts and circumstances into consideration. He states that the previous order had been passed on incomplete record and that there were legal infirmities in the same as the order was manifestly absurd and arbitrary. He, therefore, submits that the present petitions are liable to be dismissed.

13. Heard Mr. Kirti Uppal, learned Senior Counsel appearing for the Petitioners No. 1, 2 & 3 in CRL. M.C. 2324/2012 and for Respondents No.2, 3 & 4 in CRL.M.C.2163/2012, Mr. Vipin Singhania, learned Counsel for Petitioner No.1 in CRL.M.C. 2163/2012 & Respondent No.3 in CRL.M.C. 2324/2012, and Mr. Rajat Aneja, learned Counsel for the Complainant, and perused the material on record.

14. At the outset, this Court finds it pertinent to delineate the legal literature pertaining to the filing of a second complaint/FIR containing the same facts. The Supreme Court has consistently held that registration of a second FIR, which is not a cross-case, is violative of Article 21 of the Constitution of India. In T.T. Antony v. State of Kerala (supra), the Supreme Court had observed as under:

“27. A just balance between the fundamental rights of the citizens under Articles 19 and 21 of the Constitution and the expansive power of the police to investigate a cognizable offence has to be struck by the court. There cannot be any controversy that sub-

section (8) of Section 173 CrPC empowers the police to make further investigation, obtain further evidence (both oral and documentary) and forward a further report or reports to the Magistrate. In Narang case [(1979) 2 SCC 322 : 1979 SCC (Cri) 479] it was, however, observed that it would be appropriate to conduct further investigation with the permission of the court. However, the sweeping power of investigation does not warrant subjecting a citizen each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences, consequent upon filing of successive FIRs whether before or after filing the final report under Section 173(2) CrPC. It would clearly be beyond the purview of Sections 154 and 156 CrPC, nay, a case of abuse of the statutory power of investigation in a given case. In our view a case of fresh investigation based on the second or successive FIRs, not being a counter-case, filed in connection with the same or connected cognizable offence alleged to have been committed in the course of the same transaction and in respect of which pursuant to the first FIR either investigation is under way or final report under Section 173(2) has been forwarded to the Magistrate, may be a fit case for exercise of power under Section 482 CrPC or under Articles 226/227 of the Constitution.”

15. It was, therefore, held by the Supreme Court that any further complaint by the same Complainant or others against the same accused on the same facts would be prohibited as per the Cr.P.C. as the same would be tantamount to an improvement of the facts mentioned in the original complaint. In Krishna Lal Chawla and Ors. v. State of Uttar Pradesh and Anr. (supra), it had been observed by the Supreme Court that allowing of a further complaint could not be countenanced as the Complainant could not subject the accused to a double whammy of investigation by the police and

inquiry before the Magistrate. The relevant portion of the aforementioned judgement has been reproduced here as follows:

“10. Article 21 of the Constitution guarantees that the right to life and liberty shall not be taken away except by due process of law. Permitting multiple complaints by the same party in respect of the same incident, whether it involves a cognizable or private complaint offence, will lead to the accused being entangled in numerous criminal proceedings. As such, he would be forced to keep surrendering his liberty and precious time before the police and the courts, as and when required in each case. As this Court has held in Amitbhai Anilchandra Shah [Amitbhai Anilchandra Shah v. CBI, (2013) 6 SCC 348 : (2014) 1 SCC (Cri) 309] , such an absurd and mischievous interpretation of the provisions of the CrPC will not stand the test of constitutional scrutiny, and therefore cannot be adopted by us.”

16. The only exception that was enumerated by the Supreme Court to the principle of non-registration of a second FIR on the same facts of a case was categorically enunciated in Upkar Singh v. Ved Prakash, (2004) 13 SCC 292. In this case, the Supreme Court held that the decision laid down in T.T. Antony v. State of Kerala (supra) would not bar the filing of a second complaint with respect to the same incident, if such second complaint was filed as a counter-complaint by the other party. The observation of the Supreme Court can be read as follows:

“23. Be that as it may, if the law laid down by this Court in T.T. Antony case [(2001) 6 SCC 181 : 2001 SCC (Cri) 1048] is to be accepted as holding that a second complaint in regard to the same incident filed as a counter-complaint is prohibited under the Code then, in our opinion, such conclusion would lead to

serious consequences. This will be clear from the hypothetical example given hereinbelow i.e. if in regard to a crime committed by the real accused he takes the first opportunity to lodge a false complaint and the same is registered by the jurisdictional police then the aggrieved victim of such crime will be precluded from lodging a complaint giving his version of the incident in question, consequently he will be deprived of his legitimated right to bring the real accused to book. This cannot be the purport of the Code.”

17. In the instant case, a reading of the second complaint dated 30.09.2008 as well as FIR No. 116/2001 reveals that the averments in both arise from the same chain of events and the second complaint has been filed by the same Complainant against the same accused. The second complaint is, in fact, an improvement upon FIR No.116/2001. Despite the denial of the second complaint not having anything to do with FIR No.116/2001, a bare perusal of both the documents indicates that, apart from elaboration of the facts, there is no distinction between the second complaint and FIR No.116/2001. The submission of the learned Counsel for the Complainant that FIR No.116/2001 relates to theft, criminal intimidation and assault, while the second complaint pertains to cheating and criminal breach of trust by way of misappropriation is untenable. No satisfactory justification has been provided as to why the second complaint was filed with averments alleging new offences after a period of 7 years from the date of alleged incident.

18. Furthermore, the contention of the learned Counsel for the Complainant that a second complaint on the same facts can be entertained in exceptional circumstances as per Poonam Chand Jain and Anr. v. Fazru

(supra) also does not hold water in the instant case. The Complainant in the documents placed before the learned Trial Court has not produced the orders passed with respect to FIR No.116/2008. Merely mentioning such facts in the complaint does not satisfy the requirements constituting exceptional circumstances. There is nothing on record to indicate that the Complainant did not have access to the complete documents or what prevented the Complainant from supplying the full record for the registration of the second complaint. The Complainant has failed to submit what new facts have been brought forward by way of the second complaint and why the improved averments in the second complaint were not raised in the previous proceedings. Additionally, a reading of the second complaint also raises the question as to why the Complainant has refrained from mentioning the dismissal of the second revision petition *vide* Order dated 29.07.2008 which was filed against the dismissal of the second protest petition *vide* Order dated 14.09.2006 against the second Cancellation Report dated 24.04.2005 in FIR No.116/2001.

19. Consequently, the filing of a second complaint in the instant case attracts the bar instituted as per T.T. Antony v. State of Kerala (supra) and Krishna Lal Chawla and Ors. v. State of Uttar Pradesh and Anr. (supra). Furthermore, it cannot be said that there were any exceptional circumstances that warranted the filing of a second complaint on the same facts, or that the second complaint is a cross-case. Therefore, the second complaint dated 30.09.2008 was not maintainable. In view of this observation, the Ld. M.M. committed a grave error by failing to apply their mind while taking cognizance of the second complaint.

20. With regard to the summons issued to Uday Kotak, Sumit Bali and the Director of the Dealer, the Supreme Court has held consistently that the IPC does not contain any provision that attaches vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. In Maksud Saiyed v. State of Gujarat and Ors. (supra), the Supreme Court had held as follows:

“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.”

21. Similarly, in the case of Sunil Bharti Mittal v. Central Bureau of Investigation, (supra), the Supreme Court had stated that it was the cardinal principle of criminal jurisprudence that there could be no vicarious liability unless the statute specifically provides so. Delineating the circumstances when a Director/person in charge of the affairs of the company could be

prosecuted when the company is an accused person, the Supreme Court observed as follows:

“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.” (emphasis supplied)

22. In the instant case, while FIR No.116/2001 is silent on the aspect of the role played by Uday Kotak, Sumit Bali and the Director of the Dealer, the second complaint categorically mentions them as Accused Nos. 2, 3 and 5, respectively. However, the allegations levelled against them are vague and broad. The relevant portion of the second complaint has been reproduced hereinunder:

“10. That Sh. Uday Kotak, accused, No.2 and Sh. Sumit Bali, accused No.3 are the persons in charge and responsible for the day to day affairs of M/s Kotak Mahindra Primus Ltd. i.e. accused No.1. Accused No.3 Sh. Sumit Bali was in charge of the works and affairs of accused No.1 for the entire Delhi region at that point of time and all the offence has been committed on his instructions and Instigations with the purpose of wrongful gain to the accused No.1 and wrongful loss to the complainant.

11. That the accused No.4 and 5 in league with the accused No.1 - 3 conspired the entire offence and also misguided the complainant and fraudulently misappropriated one cheque of the complainant, which was given to the accused No.1 for the purpose of EMI.

12. That later on it was revealed during the court proceedings that after few days of lifting car, the

finance company, had sold the said car to one Sh. C.L. Nayak, for a very attractive consideration and the entire proceed was misappropriated by the accused finance co. To this effect photocopy of the order of Ld. Civil Judge, Tis Hazari, dated 24.04.2001 in which the accused had admitted that the said car was sold to Mr. C.L. Nayak is annexed herewith as Annexure H.”

23. The Complainant has failed to cite any specific allegations against the Petitioners in this regard and has also failed to attach sufficient evidence to impute definitively that the Petitioners played an active role in the alleged cheating and criminal breach of trust. There is no allegation regarding a specific act that has been attributed to the Petitioners. Further, the Complainant has also failed to mention the name of Accused No.5, i.e. the Director of the Dealer. This Court is of the opinion that, flowing from the material placed on record before this Court, along with the catena of Supreme Court judgements, no vicarious liability could be attached to Uday Kotak, Sumit Bali, and Director of the Dealer in the instant case.

24. The impugned summoning orders dated 23.04.2012 passed by the Ld. M.M. are devoid of any appreciation of the facts and circumstances of the instant case and showcase lack of application of judicial mind. The impugned Orders do not indicate that the Ld. M.M. has made an attempt to distinguish FIR No.116/2001 from the second complaint. The impugned Orders further inhabits nothing to state how the second complaint is tenable when FIR No.116/2001, which arises from the same chain of events, was concluded *vide* second Cancellation Report dated 24.04.2005 which was subsequently accepted in the Order dated 14.09.2006 wherein it dismissed the second Protest Petition and that a revision petition against the same was

dismissed *vide* Order dated 29.07.2008. Additionally, the Ld. M.M. has also not addressed the concealment of material fact in the second complaint on behalf of the Complainant regarding the dismissal of the second revision petition.

25. Summoning of an accused in a criminal case is a serious matter, and therefore, 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 [See Pepsi Foods Ltd. v. Judicial Magistrate, (1998) 5 SCC 749]. The Magistrate has to record his satisfaction by mentioning the role played by the accused that would bring them within the criminal net. In absence of the recording of such satisfaction, the issuance of summons is rendered illegal and amounts to the abuse of the process of law. The impugned summoning Orders are silent on the specific allegations levelled against the Petitioners - Uday Kotak, Sumit Bali, and the Director of the Dealer. The Ld. M.M. has, therefore, failed to sufficiently justify as to why summons were required to be issued in the first place in a complaint whose facts are similar to FIR No.116/2001 and should not have been entertained in the first place.

26. In light of the above observations, the impugned summoning Orders dated 23.04.2012 are riddled with legal infirmities and do not fully appreciate the facts and circumstances of the instant case as well as the law that has been laid down by the Supreme Court. This Court is of the opinion that the second complaint dated 30.09.2008 should not have been entertained by the learned Metropolitan Magistrate and, therefore, is liable to be quashed. As a consequence of the quashing of Complaint Case No.103/2010, the impugned summoning Orders dated 23.04.2012 are set aside.

27. The petitions are disposed of, along with application(s), if any.

SUBRAMONIUM PRASAD, J

DECEMBER 23, 2021

Rahul

