

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.4069 OF 2016

Mr. Om Prakash Bhatt,]
Having his office at Hindustan Unilever]
Limited, Unilever House, B.D. Sawant]
Marg, Chakala, Andheri (East), Mumbai –]
400 099.] ... Petitioner

Versus

1. State of Maharashtra,]
Through Government Pleader, High]
Court, Bombay.]
2. Municipal Corporation of Greater]
Mumbai, (MCGM),]
a body constituted under the]
provisions of the Mumbai Municipal]
Corporation Act, 1888, having its head]
office at Mahapalika Bhavan,]
Mahapalika Marg, Mumbai – 400 001.]
] ... Respondents

ALONG WITH
CRIMINAL WRIT PETITION NO.137 OF 2017

1. Hindustan Unilever Limited, formerly]
known as Hindustan Lever Limited, a]
Company incorporated under the]
Companies Act, 1956, and having its]
Registered Office at Hindustan]
Unilever Limited, Unilever House,]

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- B.D. Sawant Marg, Chakala, Andheri]
(E), Mubmai – 400 099.]
2. Mr. Sanjiv Soshil Mehta, having his]
office at Hindustan Unilever Limited,]
Unilever House, B.D. Sawant Marg,]
Chakala, Andheri (E), Mubmai – 400]
099.]
3. Mr. Pradip Jyoti Banerjee, having his]
office at Hindustan Unilever Limited,]
Unilever House, B.D. Sawant Marg,]
Chakala, Andheri (E), Mubmai – 400]
099.]
4. Mr. Subramanian Ramadorai, having]
his office at Hindustan Unilever]
Limited, Unilever House, B.D. Sawant]
Marg, Chakala, Andheri (E), Mubmai]
– 400 099.]
5. Mr. Harish Manghan Manwani,]
resident of Singapore and having]
office at Hindustan Unilever Limited,]
Unilever House, B.D. Sawant Marg,]
Chakala, Andheri (E), Mubmai – 400]
099.] ... Petitioners

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Mumbai, (MCGM),]
a body constituted under the]
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head office at Mahapalika Bhavan,]

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Mahapalika Marg, Mumbai – 400]
001.] ... Respondents

....

Mr. Amit Desai, Sr. Advocate with Mr. Mahesh Londhe, Mr. Netaji Gawade, Mr. Akshay Udeshi and Mr. Saurabh Deorukhakar i/b Mr. Sanjay Udeshi & Co. for the Petitioners.

Mr. H. J. Dedhia, A.P.P. for the State.

Ms. Pratibha Shelke for Respondent No.2.

CORAM: SMT. BHARATI DANGRE, J.

DATED : 23RD SEPTEMBER, 2019

ORAL JUDGMENT:-

1. Since the two Writ Petitions share common set of facts and revolves around similar issue, they are being heard together.
2. Rule. Rule made returnable forthwith and heard by consent of the parties.
3. Writ Petition No.4069 of 2016 is filed by an independent Director whereas Writ Petition No.137 of 2017 is filed by Hindustan Unilever Limited, a Company incorporated under the provisions of the Companies Act and several other Directors have joined themselves as Petitioners in the said Writ Petition. Both the Writ Petitions seek a relief of quashing and setting aside of the Order dated 16th March 2015 passed by the Addl. Chief

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Metropolitan Magistrate, Ballard Pier, Mumbai, thereby issuing summons to the present Petitioners.

4. The Petitioner-company of which the other Petitioners are Directors is engaged in the business of manufacturing and dealing with consumer products and claims to have branches all over India. The place of business of the Petitioner-company is at its registered address i.e. 165/166, Backbay Reclamation, Mumbai. The Company intended to have additional place of business and somewhere in the end of December 2013, obtained premises at 3rd floor, Army & Navy Building, Mahatma Gandhi Road, Mumbai and got itself registered under the Shops and Establishments Act. Accordingly, a Certificate dated 15th January 2014 came to issued in favour of the Company. On 19th January 2015, Inspector, Shops and Establishments visited the premises and recorded certain alleged discrepancies noted by him at the premises, allegedly amounting to non-compliance of the provisions of the Shops and Establishments Act and Rules. It is the case of the Petitioners that the business of the Petitioners from the said premises completely stopped and the premises were not functional from May 2015 and they continued to remain closed from that date onwards. The violation which resulted into issuance of summons noted the following discrepancies qua the provisions contained in the Act and Rules.

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Section 8 – Not notifying to the Inspector in Form 'E' together with the prescribed fees within 15 days after expiry of the quarter to which it relates/relating to change/changes.

Section 51 – Prescribe registers, records and notes required to be kept under the for the purpose of BSNE and Act – not produced on demand during inspection.

Rule 2A – the name of the Board of the Establishment is not displayed in Marathi Devgiri script.

Respondent No.2 filed a complaint against the Company and some of its Directors. On 16th March, 2016, the learned Metropolitan Magistrate was pleased to pass an order of “Issue Summons”.

5. Learned senior counsel Mr. Desai assails the said order on multiple grounds and at the outset, he submits that the said order is passed without recording any verification of statement of the complainant and without examining the complainant or any witnesses.

The ground which is strongly pressed in service by the learned senior counsel is the mechanical manner by which the summons came to be issued against the Petitioners, in particular, when no averments/allegations are contained in the complaint qua the Petitioners. He would submit that for the purpose of the Maharashtra Shops and Establishments Act, the term 'employer'

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means a person owning or having ultimate control over the affairs of an establishment and the alleged offences are qua the employer and since the statute do not attribute any vicarious liability to an individual Director, the liability cannot be fastened on the Petitioners and the issuance of summons by the learned Magistrate is erroneous. Further, he would also submit that the learned Magistrate has failed to take into consideration a settled and basic principle being, to launch the prosecution against the alleged Directors, there must be a specific allegation in the complaint attributing a specific role played by them in the transaction and it must contain a clear and unambiguous allegation as to how the Directors are in-charge and responsible for the conduct of the business of the Company and in absence of any such averment, the complaint cannot be entertained. He would submit that a Director could have been made liable only on being established that he was in charge and responsible for the conduct of the business of the Company at the relevant time and since the complaint failed to reflect the very basis of setting the criminal law into motion, the Magistrate has grossly erred in issuing process.

6. The Maharashtra Shops and Establishments Act, 1948 which is a law relating to the conditions of work and employment in shops, commercial establishment, residential, hotels, restaurants, eating house, etc. defines the term 'Employer' in

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Section 2(7) as 'Employer' means a person owning or having ultimate control over the affairs of an establishment and Section 2(16) defines the term "Manager" means a person declared to be a manager under Section 7. Section 2(8) defines "Establishment" to mean a shop, commercial establishment, residential hotel, restaurant, eating house, theatre, or other place of public amusement or entertainment to which this Act applies and includes such other establishment as the [State] Government may, by notification in the *Official Gazette*, declare to be an establishment for the purposes of this Act;

The enactment makes it imperative for every establishment to be registered by the employer. Section 8 casts a duty on the employer to notify, in a prescribed form, any change in any of the particulars contained in the statement submitted to obtain registration, within such period, after the change has taken place, and accordingly, the Inspector shall effect the change in the register of establishments and amend the registration certificate or issue a fresh registration certificate.

7. Perusal of the Inspection note on the basis of which the complaint was lodged is signed by the Inspector, Shops and Establishments Department and it records that the premises of the Hindustan Unilever Limited on 3rd Floor, Army & Navy Building were inspected on 19th January 2015 and, at that time, one Mrs. Prajakta Tabib, Manager, H.R was present. The

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Registration Certificate was produced and it was found valid upto 2015. An inquiry was made with the employees and it alleges that the employment register in Form J and leave register in Form M are not produced but the ordinary register for attendance is produced. It further records that as per the ordinary attendance register there are 13 employees instead of 20 and this change is not notified to the area Inspector till date.

8. In the light of the statutory scheme referred to above, I have perused the documents annexed to the petitions. The position that emerges on the basis of the said documents reflects that the Certificate of Registration was granted for an additional place of business to the Company at 1st and 3rd Floor of Army and Navy Building, Mumbai, in the year 2014. The Registration Certificate of the additional place of business / godown at the above-mentioned address was issued in Form 'D' of the Maharashtra Shops and Establishments Act, 1948 by the Inspector certifying that the establishment has been registered as Commercial-II. The first Registration Certificate issued in the year 2014 was valid till 31st December, 2014 and the second one for the year 2015 was valid till 31st December, 2015. An application was preferred by the Authorized Signatory of Hindustan Unilever Limited intimating the change which had taken place in respect of the information forwarded in Form 'A'. It informed the following :

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“(1) Deletion of below Backbay Address as property sold out; Hindustan Unilever House, 165/66, Backbay Reclamation, Mumbai.

(2) Change of Additional place of work to main address as below:

3rd Floor, Army and Navy Building, M. Gandhi Road, Mumbai.

*(3) Change of Employee Strength:
From 20 to 13.*

(4) Update Director List”

9. This notice of change dated 11th February, 2015, according to the Respondents, is rejected and filed on 5th September, 2015 on the ground that proper documents are not submitted for appointment of the Directors. It was advised to produce the appointment of Directors.

9. It is the stand taken in the Affidavit filed by the Inspector in the employment of Respondent No.2 that the changes which were notified by the Company in Form 'E' came to be rejected and noting in the four inspections conducted on four distinct dates are mentioned. This document forms the fulcrum of the stand of the Respondents.

10. The impugned notice dated 19th January, 2015 makes a reference to the visit and notify the alleged violation of Section 8

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in not notifying the Inspector of the change in Form 'E' and not notifying the change in the number of employees. The issue that arises is whether for these violations, the Petitioner in Writ Petition No.4069 of 2016 as a director can be made liable. In Criminal Writ Petition No.137 of 2017, it is the Company, who has approached this Court along with its Chief Executive Officer and the Managing Director and Director who was in charge of vertical supply chain and an independent Director and the Non Executive Chairman.

The submission of the Petitioners is that for the offence and penalties under the Maharashtra Shops and Establishments Act, 1948, it is the 'employer' who is liable for conviction. Section 52 of the said Act which sets out the contravention of certain provisions and makes it punishable as an offence, reads thus:

“52. Contravention of certain provisions and offences.

- (a) If any employer fails to send to the Inspector a statement within the period specified in section 7 or to notify a change within the period specified in section 8 or to notify the closing of his establishment under section 9; or

(b) If in any establishment there is any contravention of any of the provisions of sections 10, 11, 13, 18, 19, 20, 26, 27, 39, 40, 41 or 42 or any orders made thereunder; or

(c) If in any establishment any person is required or allowed to work in contravention of sections 14, 15, 16, 17, 21, 22, 23, 24, 28, 29, 30, or 31; or

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(d) If in any establishment a child or young person or woman is required or allowed to work in contravention of section 32, 33 or 34; or

[(e) If any employer or manager contravenes the provisions of Section 51 or any, employer contravenes the provisions of section 62 or 65; or]

(f) If in any establishment there is any contravention of any section, rule or order for which no specific punishment is provided in this Act;

the employer and the manager shall, on conviction, each be punished [for each offence] with fine which shall not be less than [one thousand rupees] and which may extend to [five thousand rupees]:

[Provided that, if the contravention of the provisions of sub-section (1) of section 7 is continued after the expiry of the tenth day after convictions the employer shall on conviction be punished with a further fine which may extend to [one hundred rupees] for each day on which the contravention is so continued.]

11. In the present case, there is alleged violation of Sections 8 and 51 of the Shops and Establishments Act. The enactment also contains a provision determining as to who is the employer for the purposes of the Act and it is contained in Section 58, which reads thus:

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58. Determination of employer for the purposes of this Act. - (1) *Where the owner of an establishment is a firm or other association of individuals, any one of the individual partners or members thereof may be prosecuted and punished under this Act for any offence for which an employer in an establishment is punishable:*

Provided that the firm or association may give notice to the Inspector that it has nominated one of its members who is resident in the [State] to be the employer for the purposes of this Act and such individual shall so long as he is so resident be deemed to be the employer for the purposes of this Act, until further notice cancelling the nomination is received by the Inspector or until he ceases to be a partner or member of the firm or association.

(2) *Where the owner of an establishment is a company, any one of the directors thereof, or in the case of a private company, any one of the share holders thereof, may be prosecuted and punished under this Act for any offence for which the employer in the establishment is punishable:*

Provided that the company may give notice to the Inspector that it has nominated a director, or, in the case of a private company, a shareholder who is resident in the [State] to be the employer in the establishment for the purposes of this Act, and such director or shareholder shall so long as he is so resident be deemed to be the employer in the establishment for the purposes of this Act, until further notice cancelling his nomination is received by the Inspector or until he ceases to be a director or shareholder.

12. The question that falls for determination in the present Writ Petitions is whether the individual Directors of the Company can be fastened with the liability to be discharged by an “employer” under the Act of 1948 and whether they can be subjected to prosecution under the enactment” The legal position as regards principles of attribution/alter ego is, by this point of time, well defined and settled. “To attribute” is to say or believe that somebody is responsible for doing something; to say or think that something is the result or work of someone else. The attribution principle seeks to attribute to the company actions of its agents who acts on its behalf and manages its affairs and enters into transaction on its behalf. The company which is a separate legal entity, yet, it do not possesses the ability to think and act for itself, for a company to enter into any transaction, it cannot be held liable for any crime, tort – the law must determine which thoughts and actions of its directors, employers and agents may be attributed to it.

13. The attribution principle is extension of ‘directing the mind and will’ principle. It is invoked when the vicarious liability

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principle cannot be applied because an offence is such that it can be committed only by a human being and the company cannot be held liable and convicted, for example, an offence of murder.

In *Sunil Bharti Mittal v. C.B.I. reported in (2015) 4 SCC 609*, the Apex Court led down the principle of “alter ego” and it ruled that when the company is the accused, its directors can be roped only if (a) there is sufficient incriminating evidence against them coupled with criminal intend or (b) the statutory regime attracts the doctrine of vicarious liability. Allowing the appeal filed by the two accused, who have been summoned by an order passed by the Special Court (Vigilance) in the 2G Spectrum Case, it was held that the principles of alter ego can only be applied to make a company liable for an act committed by a person or group of person who control the affairs of the company as they represent the alter ego of the company, however, it cannot be applied in reverse direction to make directors liable for the act of the company. It is clarified that the application of principles of vicarious liability to make the directors of the company liable for an offence committed, can only be done if the statute provides for

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it. The criminal liability of a company would arise when an offence is committed in relation to its business by a person or body of persons in control of its affairs. The position that emerges as regards mens rea to be attributed to the Company as far as India is concerned, is well settled by this point of time and 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, Corporation may be subject to indictment or other criminal process, although the criminal act [may be] committed through its agents.

14. It is pertinent to note that there is no provision contained in the Shops and Establishments Act, 1948 holding the directors of any Company vicariously liable for violation of its provisions. The statutory scheme of the Act discloses that it is the 'employer' who is cast with the duty to ensure the compliance including the

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registration of the establishment and the duty to produce the relevant registers, records, etc. required to be kept for the purpose of the Act of 1948. Failure to comply with the provisions of the Act by the 'employer' attracts penal provisions and amounts to an offence and it is the 'employer' and the 'manager' who are liable for conviction for the offences contemplated under Section 52.

15. The 'employer' is therefore defined to mean a person owning or having ultimate control over the affairs of an establishment. By virtue of Section 58 of the enactment, the owner of an establishment of the Company or anyone of the directors thereof may be prosecuted and punished under the Act for any offence in which the 'employer' in the establishment is punishable. The proviso appended to sub-section (2) of Section 58 provides that the Company may give notice to the Inspector that it has nominated a director to be the 'employer' in the establishment for the purposes of this Act and such director shall be then deemed to be the 'employer' in the establishment for the purposes of this Act until further notice cancelling his

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nomination is received or until he ceased to be a director or shareholder. Apart from Section 58, there is no provision in the Act making every director of the Company to be brought within the sweep of the term 'employer' and, therefore, unless and until it is specifically averred in the complaint that the person in the capacity of director was having ultimate control over the affairs of the establishment, he is not liable to be prosecuted for the offences under the Act of 1948. On the visits to the premises, the inspector has disclosed that one Mrs. Prajakta Tabib, Manager was present and she produced the relevant documents to the Inspector. In utter ignorance of the said fact, the Additional Chief Metropolitan Magistrate issued summons to the five directors of M/s. Hindustan Unilever Limited along with the company itself. The summons was preceded by a sanction from the Assistant Municipal Commissioner under Section 60 (1) of the Act to institute prosecution against the Company and its directors. All the directors were picked up from the list of directors which was supplied in compliance of the provisions of the Act of 1948. The Petitioner in Writ Petition No.4069 of

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2016 is an independent director whereas the Petitioner No.2 in Writ Petition No.137 of 2017 is the Chief Executive and Managing Director. The Petitioner No.3 – Mr. Pradip Jyoti Banerjee is a director/supply chain. Mr. S. Ramadorai is also an independent director and Mr. Harish Manwani, Petitioner No.5 is a non-Executive Chairman. Without application of mind as to whether these directors would fall within the meaning of the term 'Employer', who are liable for prosecution for violation of the provisions of Sections 8 and 51 of the Act, the process has been mechanically issued.

16. It is settled position of law that the criminal liability in form of penal provision must be strictly construed and there is no vicarious liability under the criminal law unless the statute takes it within its fold. The Maharashtra Shops and Establishments Act, 1948 do not contain any provision to be fastened for vicarious liability on all the directors and do not make all of them liable for the offence alleged to have been committed, whether or not they own or have ultimate control over the affairs of the establishment.

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Another point worth consideration is that an establishment of a Company is distinct than a Company and it may cover a particular establishment belonging to a Company and as can be seen from the present case, the additional place of business was granted a registration as Commercial-II under the Maharashtra Shops and Establishments Act, 1948, it being an additional place of business/godown. For the alleged violation which has occurred in one of the establishments belonging to the Company, the directors of the Company cannot be held liable for prosecution. The provisions of the penal statute which are required to be strictly construed cannot hold the independent directors and the directors who are not concerned with the establishment of a company liable for prosecution for the alleged violation. This may amount to traversery of justice. The allegations in the complaint as put up before the Magistrate do not contain an averment to the effect that the Petitioners as the directors were in charge of the affairs of the establishment nor any material has been placed on record to that effect. The Magistrate ought to have applied his mind to the scheme of the enactment

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and ensured its strict compliance. A Company being a jurisdic person, all its deeds and functions are the result of act of some of the individuals. Only those of the individuals who are responsible for the acts done in the name of the Company can be made personally liable if the statute fixed a responsibility on them. Every person who was at the helm of the affairs of the Company cannot be held responsible for violation of certain provisions of the enactment in one of its establishment.

17. In *S.M.S. Pharmaceuticals Limited v. Neeta Bhalla & Anr.*, reported in (2005) 8 SCC 89, the Hon'ble Apex Court in the backdrop of Section 138 and 141 of the Negotiable Instruments Act, 1881, where by a specific provision every person who is in charge and responsible for the company at the time of commission of offence under Section 138 of the Act is deemed to be guilty of the offence, and liable to be proceeded against and punished was deliberated upon. The following observations are gainfully reproduced in the context of the above discussion:

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“15. Cases have arisen under other Acts where similar provisions are contained creating vicarious liability for officers of a company in cases where primary liability is that of a company. State of Karnataka v. Pratap Chand and others, 1981 (2) SCC 335 was a case under the Drugs and Cosmetics Act, 1940. Section 34 contains a similar provision making every person in charge of and responsible to the company for conduct of its business liable for offence committed by a company. It was held that a person liable for criminal action under that provision should be a person in overall control of day-to-day affairs of the company or a firm. This was a case of a partner in a firm and it was held that a partner who was not in such overall control of the firm could not be held liable. In Municipal Corporation of Delhi v. Ram Kishan Rohtagi and others [1983 (1) SCC 1], the case was under the Prevention of Food Adulteration Act. It was first noticed that under Section 482 of the Criminal Procedure Code in a complaint, the order of a Magistrate issuing process against the accused can be quashed or set aside in a case where the allegation made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is arrived at against accused. This emphasises the need for proper averments in a complaint before a person can be tried for the offence alleged in the complaint.

16. In State of Haryana v. Brij Lal Mittal and others 1998 (5) SCC 343 it was held that vicarious liability of a person for being prosecuted for an offence committed under the Act by a company arises if at the material time he was in charge of and was also responsible to the company for the conduct of its

business. Simply because a person is a director of a company, it does not necessarily mean that he fulfils both the above requirements so as to make him liable. Conversely, without being a director a person can be in charge of and responsible to the company for the conduct of its business.

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18. To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a persons can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a Company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That respondent falls within parameters of Section 141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141 he would issue the process. We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial.”

18. In *S.K. Alagh v. State of Uttar Pradesh & Ors. Reported in (2008) 5 SCC 662*, while determining whether the vicarious liability can be fastened on the Managing Director or Directors or other officers of the Company, which is accused of a commission of offence under Section 406 of the IPC, the Apex Court observed as under:

“16. Indian Penal Code, save and except some provisions specifically providing therefor, does not contemplate any vicarious liability on the part of a party who is not charged directly for commission of an offence.

19. As, admittedly, drafts were drawn in the name of the company, even if appellant was its Managing Director, he cannot be said to have committed an offence under Section 406 of the Indian 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.

20. We may, in this regard, notice that the provisions of the Essential Commodities Act, Negotiable Instruments Act, Employees' Provident Fund (Miscellaneous Provision) Act, 1952 etc. have created such vicarious liability. It is interesting to note that Section 14A of the 1952 Act specifically creates an offence of criminal breach of trust in respect of the

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amount deducted from the employees by the company. In terms of the explanations appended to Section 405 of the Indian Penal Code, a legal fiction has been created to the effect that the employer shall be deemed to have committed an offence of criminal breach of trust. Whereas a person in charge of the affairs of the company and in control thereof has been made vicariously liable for the offence committed by the company along with the company but even in a case falling under Section 406 of the Indian Penal Code vicarious liability has been held to be not extendable to the Directors or officers of the company.”

19. The Full Bench of this Court as early as in the year 1984 while dealing with the Employees State Insurance Act, 1948 and determining the role of a Director as a principal employer, in the case of *Suresh Tulsidas v. Collector of Bombay reported in 1984 Mh.L.J. 117*, observed as under:

“16. It may be pointed out that the definition of "occupier" in section 2(n) of the Factories Act refers to the person "who has ultimate control over the affairs of the factory" and not "affairs of the company". But even under the Companies Act so far as the affairs of the company are concerned, the ultimate control of the company will not lie with any particular director at all. The directors act collectively and they function collectively as a Board of Directors. We may refer to a passage from Gower's Principles of Modern Company Law, Fourth Edition, page 152,

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where the learned author has observed:

"Where powers are conferred on the directors under clauses such as those considered above, they are conferred upon the directors collectively as a board. Prima facie, therefore, they can be exercised only at a board meeting of which due notice has been given and at which a quorum is present." (Emphasis supplied.)

Mr. Tulzapurkar has referred us to a passage, from Pennington's Company Law, Fourth edition, at page 523, which in our view, says nothing different from the passage we have quoted above. The passage relied upon by Mr. Tulzapurkar is at page 523, which reads as follows:

"The board of directors and meetings of members of a company can between them exercise all of the company's powers. Subject to the provisions of the Companies Act, 1948, which require certain powers to be exercised by the members in general meetings, the division of powers between the board and the members is determined entirely by the articles of association, but the distribution can, of course, be varied from time to time by an alteration of the articles."

The above passage does not refer to the powers of any individual director but it refers to the division of powers between the members of the Company and the "Board of Directors" as such, and indeed, in the

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same Chapter, the learned author has further pointed out at page 525 as follows:

"Directors can only exercise their powers collectively by passing resolutions at board meetings, unless the articles otherwise provide."

The proposition that each individual director must be held to be in control of a factory belonging to a company is, therefore, wholly inconsistent with the general provisions of the Company law where the directors function as a board or body and not as individuals. We may make it clear that we are not dealing with a case where a director is specifically notified to the authorities as an occupier for the purpose of the Factories Act. If that is done, such a director becomes an occupier not on account of the fact that he is a director but because he has been nominated as an occupier for the purpose of the Factories Act.

17. The observations quoted above also indicate that a director normally is not a person who has complete control over the affairs of a Company or a factory. As already pointed out, the definition of "occupier" in section 2(n) of the Factories Act does not refer to the "ultimate control over the affairs of the company". What is necessary for a person to be styled or described as occupier is that he must have ultimate control over the affairs of the factory. This undoubtedly is a question of fact and will have to be decided on evidence, and it can never be assumed that a director of the company has ultimate control over the affairs of a factory owned by the company merely

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by virtue of being a director.”

20. The aforesaid judgments clearly cull out the legal position and since the intention of the Legislatures in defining the term 'Employer' under the Act of 1948 and making him responsible for the non-compliance of the provisions of the said Act would be defeated by making every directors of the Company responsible for the alleged violations in one of the Establishments belonging to the Company which is registered under the Act of 1948.

21. For the reasons recorded above, the order of issuance of process by the Magistrate against the Petitioners cannot be sustained. The Petitioner-company as well as its Directors are not liable for prosecution under Section 52 of the Maharashtra Shops and Establishments Act, 1948.

In the light of the aforesaid observations, in exercise of jurisdiction conferred under Section 482 of the Cr.P.C. in order to prevent the abuse of process of law, in the wake of the allegations contained in the complaint and in the backdrop of the statutory

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scheme, which is devoid of any provision fixing the vicarious liability on the independent director, I hold and declare that the Petitioners are not liable for prosecution under Section 52 of the Maharashtra Shops and Establishments Act, 1948 for alleged violation by the “employer”. Resultantly, the impugned orders are quashed and set aside. Rule is made absolute in terms of prayer clause (a).

[SMT. BHARATI DANGRE, J.]

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