

**The 2<sup>nd</sup> Mrinalini Devi Memorial**  
**National Moot Court Competition, 2019**

*Organised by*  
**Bengal Law College, Santiniketan**

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**BEST MEMORIAL**

*SCHOOL OF LAW, CHRIST (DEEMED TO BE) UNIVERSITY,  
BANGALORE*

**2<sup>ND</sup> MRINALINI DEVI MEMORIAL NATIONAL MOOT COURT COMPETITION**  
**BENGAL LAW COLLEGE, SANTINIKETAN**

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*Before,*

**THE HIGH COURT OF JUDICATURE**  
**SUKH PRADESH, INDICA**

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**WRIT PETITION (CRIMINAL) NO.     /2018**

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**MR. MOHANA NAND**

**MR. HEISENBERG**

**MR. ASHARAM**

(PETITIONERS)

v.

**STATE OF SUKH PRADESH (RESPONDENT 1)**

**REDSTAG LLP (RESPONDENT 2)**

**MR. SUKHARAM (RESPONDENT 3)**

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**WRIT PETITION UNDER ARTICLE 226 OF THE CONSTITUTION OF INDICA**

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**UPON SUBMISSION TO THE HON'BLE JUSTICE, HIGH COURT OF JUDICATURE**  
**SUKH PRADESH, INDICA**

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**MEMORANDUM ON BEHALF OF THE PETITIONERS**

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**LIST of ABBREVIATIONS**

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- |     |                  |   |  |
|-----|------------------|---|--|
| 1.  | Para             | : | Paragraph  |
| 2.  | AIR              | : | All India Reporter   |
| 3.  | Art.             | : | Article  |
| 4.  | &                | : | And  |
| 5.  | CrPC             | : | Criminal Procedure Code, 1973  |
| 6.  | Ed.              | : | Edition  |
| 7.  | Hon'ble          | : | Honourable   |
| 8.  | IPC              | : | Indican Penal Code, 1860   |
| 9.  | Moot Proposition | : | Moot Proposition, 2 <sup>nd</sup> Mrinalini Devi Memorial National<br>Moot Court Competition, 2019 |
| 10. | Ors.             | : | Others   |
| 11. | S.               | : | Section  |
| 12. | SC               | : | Supreme Court  |
| 13. | SCC              | : | Supreme Court Cases  |
| 14. | v.               | : | Versus   |

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1	M.P. Jain, Indian Constitutional Law (7 <sup>th</sup> ed. 2014).	17
2	V.N. Shukla, Constitution Law of India (11 <sup>th</sup> ed. 2008).	-
3	H.M. Seervai, Constitutional Law of India (4 <sup>th</sup> ed. 2004).	-
4	Ratanlal & Dhirajlal, The Code of Criminal Procedure, 673 (18 <sup>th</sup> ed., 2007).	26
5	Gaur, KD, Criminal Law: Cases and Materials, (6 <sup>th</sup> ed. 2009).	-
6	Ratanlal & Dhirajlal, The Indian Penal Code, (33 <sup>rd</sup> ed. 2011).	-
7	D.D. Basu, Constitution of India (8 <sup>th</sup> ed. 2009).	-

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1	The Constitution of India, 1950	-
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SL. No.	NAME	PAGE(S)
1	V. Umakanth and M. Naniwadekar, Corporate Criminal Liability And Securities Offerings: Rationalizing The Iridium Motorola Case: Iridium India Telecom Ltd. v. Motorola Incorporated & Ors, National Law School of India Review 2, 2013, available at <a href="https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1801628">https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1801628</a>	19
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3	S. Elson, Legal Liability of Holding Companies for Acts of Subsidiary Companies, 4 Washington University Law Review 333 (1930).	19
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**STATEMENT *of* JURISDICTION**

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The Counsel for the Petitioner, most humbly and respectfully, submit that this Hon'ble High Court of Judicature of Sukh Pradesh, Indica has the requisite jurisdiction to entertain this instant writ petition filed under Article 226<sup>1</sup> of the Constitution of Indica, 1950.

It is further submitted that all procedural requirements have been adhered to in the prescribed manner.

The present memorandum sets forth the facts, contentions and arguments in the present case.

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<sup>1</sup> Article 226, Constitution of Indica, 1950.

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**STATEMENT of FACTS**

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**~DESCRIPTION OF PARTIES TO THE TRIPARTITE AGREEMENT~**

**~ ROYAL CHIVAS PRECISION EQUIPMENT LIMITED ~**

Currently having a dominant market share in the niche of research, development, manufacturing, and marketing of high precision total stations and theodolites, the equipment used for the purposes of the survey of the mining industry. The company is a group company of a family owned holding company by the name of Royal Chivas Holdings BV and currently headed by Mr Mohana Nand as the CEO and Chairman. The holding company has its subsidiaries in 95 countries around the world, and their products are known for accuracy and durability.

**~ BLUEPIPER MINING PTY. LIMITED ~**

A South African mining company, having a number of mines in their ownership of Non Coking Thermal Bituminous and Anthracite Coal, in South Africa, Mozambique, Australia, Chile and is a minority stakeholder and technology partner in a company which is a lease-holder of a state-leased Coal Mine in the State of Barkhand in Indica. The company is currently headed by Mr Asharam.

**~REDSTAG LLP~**

RedStag LLP is a Limited Liability Partnership firm based in Sukh Pradesh, Indica. It is in the business of trading of imported high precision machinery items, commonly used for the purposes of survey and/or testing in the mining industry. It is also an authorized trading agent of Royal Chivas Precision Equipment Limited. The partnership is represented by 3 partners, Tukaram, Dhaniram and Sukharam.

**~THE TRIPARTITE AGREEMENT~**

RedStag approached BluePiper for business. BluePiper was looking at offers for equipment of survey for exploration of minable areas to expand their current capacity and have asked RedStag to put in their offer. RedStag's quote was split into two parts: the First Part was the supply of the goods; whereby the goods were shipped from Royal Chivas's factory in Germany and BluePiper was to open an irrevocable international Letter of Credit of the cost of the goods. On the successful discounting of the Letter of Credit, Royal Chivas was supposed to transfer USD 60,000 (United States Dollars Sixty Thousand) as a trade commission, by mode of a Telegraphic Transfer. The Second Part of the quote was for the service of the equipment, which

RedStag was supposed to send trained personnel and bill themselves to BluePiper. RedStag's quote emerged to be awarded a contract.

The contracts was decided to be governed by the Laws of Indica and a tripartite agreement was drawn up between BluePiper, Royal Chivas and RedStag for the supply of the goods; where the clause of trade commission was disclosed; and BluePiper agreed to the same. It was also agreed by all that RedStag would be notified of all documents that Royal Chivas and BluePiper shall exchange with regards to payment, shipping and transfer of goods. The agreement was drawn up and was signed by the Manager Sales of Royal Chivas, Mr. Asharam for BluePiper and Mr. Sukharam on behalf of RedStag; where RedStag took up the guarantee of payment on behalf of BluePiper and supply of materials on behalf of Royal Chivas for the supply part.

**~LIST OF EVENTS LEADING TO THE CRIMINAL COMPLAINT FILED BY REDSTAG LLP~**

1. RedStag was intimated that a Letter of Credit was opened with SeherBank with BluePiper being the applicant and Royal Chivas being the beneficiary. RedStag however, didn't receive the amount of USD 60,000 as commission.
2. On being served a legal notice, Royal Chivas replied by a notice of counsel that the discounting charges of the Documentary credit amounted to around USD 76,975 (United States Dollars Seventy Six Thousand Nine Hundred Seventy-Five) and the same has been apportioned from the payables of Royal Chivas to RedStag; and a counter-demand of USD 16,975 (United States Dollars Sixteen Thousand Nine Hundred Seventy-Five) was placed on RedStag. However, no details of charges of discounting were given to RedStag.
3. RedStag in their effort of reconciliation asked for a joint meeting with the three parties to the agreement; which was denied subsequently.
4. BluePiper then raised a complaint ticket of malfunctioning of device and asked for the device to be serviced; though the device was under replacement warranty of Royal Chivas on complaint of any defect before 12 (twelve) months, from the date of purchase; and the service commitment of RedStag arose subsequent to the 12 months. On pointing out of the clause, BluePiper withdrew the ticket, yet served a notice of compensation a few days later on account of non-performance, and a termination of the Annual Maintenance Contract

(AMC). At all times in between, RedStag was not paid the due amount of USD 60,000 on account of the commission; any amounts under AMC, since not due, was not claimed.

**~THE CRIMINAL COMPLAINT~**

RedStag filed a criminal complaint under, Sections 403, 405, 415, 418, 420 and 423 read with Sections 120B and 34 of the Indian Penal Code before the Chief Judicial Magistrate, Tis Hazari Court, Sukh Pradesh.

**~SUMMONING ORDER OF THE CHIEF JUDICIAL MAGISTRATE~**

The Chief Judicial Magistrate, Tis Hazari Court passed an order summoning the accused Mr Mohana Nand, Mr Heisenberg & Mr Asharam under Sections 403, 405, 420 and 423 read with Sections 120B and 34 of the Indian Penal Code and allotted them sixty calendar days to present themselves in the Hon'ble court.

**~CHALLENGE TO THE SUMMONING ORDER~**

The order so passed by the Chief Judicial Magistrate is appealed by the Accused in this instant appeal before the High Court of Judicature at Sukh Pradesh, India.

**~DESCRIPTION OF PARTIES TO THE WRIT PETITION~**

**~PETITIONERS~**

**MR. MOHANA NAND**

CEO & Chairman, Royal Chivas

**MR. HEISENBERG**

Manager Sales, Royal Chivas

**MR. ASHARAM**

Head, BluePiper Mining Pty. Limited

**~RESPONDENTS~**

**STATE OF SUKH PRADESH**

For Chief Judicial Magistrate, Tis Hazari Court, Sukh Pradesh

**REDSTAG LLP**

**MR. SUKHARAM**

Partner, RedStag LLP

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**ISSUES *for* CONSIDERATION**

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~ ISSUE – I ~

**WHETHER THE WRIT PETITION IS MAINTAINABLE IN THE INSTANT CASE?**

~ ISSUE – II ~

**WHETHER THE THEORY OF ALTER-EGO CAN BE APPLICABLE TO A CEO AND CHAIRMAN OF THE HOLDING COMPANY OF ANY CRIMINAL BREACH OF ITS SUBSIDIARY AND/OR GROUP COMPANY, IF THE SAID INDIVIDUAL, PERSONALLY HOLDS A MINORITY STAKE IN THE GROUP COMPANY?**

~ ISSUE – III ~

**WHETHER THE IPC AND/OR CRPC HAS THE JURISDICTION AND/OR AUTHORITY AND/OR PROVISIONS TO SUMMON A FOREIGN NATIONAL WHEN HE ENTERS INTO AN INTERNATIONAL CONTRACT WITH ONE PARTY OF THE CONTRACT IS AN INDICAN NATIONAL AND/OR AND INDICAN COMPANY/FIRM, AND THEREFORE WHETHER SUMMONS ISSUED BY THE CHIEF JUDICIAL MAGISTRATE IS MAINTAINABLE?**

**SUMMARY of ARGUMENTS**

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**I. WHETHER THE WRIT PETITION IS MAINTAINABLE IN THE INSTANT CASE?**

It is most humbly submitted that the writ petition filed by Mr Mohana Nand, Mr Heisenberg & Mr Asharam is maintainable before the High Court of Sukh Pradesh, Indica as there is a violation of a fundamental right under Part III of the Constitution of Indica. That the cause of action arose within the territorial jurisdiction of this Hon'ble High Court. The remedy under Article 226 is available in the present matter and that existence of an alternative remedy is no bar. Hence the present writ petition is maintainable.

**II. WHETHER THE THEORY OF *ALTER-EGO* CAN BE APPLICABLE TO A CEO AND CHAIRMAN OF THE HOLDING COMPANY OF ANY CRIMINAL BREACH OF ITS SUBSIDIARY AND/OR GROUP COMPANY, IF THE SAID INDIVIDUAL, PERSONALLY HOLDS A MINORITY STAKE IN THE GROUP COMPANY?**

It is most humbly submitted that the theory of *alter ego* is not applicable to a CEO and Chairman of the holding Company of any criminal breach of its subsidiary and/or a group company, if the said individual, personally holds a minority stake in the group Company as they are two separate legal entities. The theory of vicarious liability has no ground in the present case as there is a strict construction of criminal statutes. Additionally, the corporate veil cannot be pierced under the guise of a single economic entity of the two companies.

**III. WHETHER THE IPC AND/OR CRPC HAS THE JURISDICTION AND/OR AUTHORITY AND/OR PROVISIONS TO SUMMON A FOREIGN NATIONAL WHEN HE ENTERS INTO AN INTERNATIONAL CONTRACT WITH ONE PARTY OF THE CONTRACT IS AN INDICAN NATIONAL AND/OR AND INDICAN COMPANY/FIRM, AND THEREFORE WHETHER SUMMONS ISSUED BY THE CHIEF JUDICIAL MAGISTRATE IS MAINTAINABLE?**

It is humbly submitted that the summons issued in the present matter are not maintainable because the petitioners are not Indican nationals and have never resided in the territory of Indica and hence the Indican Penal Code, 1860 is not applicable. Further, the provisions of Criminal Procedure Code, 1973 have not been complied with for summoning foreign nationals.

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WRITTEN SUBMISSIONS

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**I. WHETHER THE WRIT PETITION IS MAINTAINABLE IN THE INSTANT CASE?**

1. It is humbly submitted that the writ petition filed by Mr Mohana Nand, Mr Heisenberg & Mr Asharam is maintainable before the High Court of Sukh Pradesh, Indica as there is a violation of a fundamental right under Part III of the Constitution of Indica [1.1]. The cause of action arose within the territorial jurisdiction of the Hon'ble High Court [1.2]. Remedy under Article 226 is available in the present matter [1.3] and that existence of an alternative remedy is no bar to the present writ petition [1.4].

**1.1 VIOLATION OF A FUNDAMENTAL RIGHT UNDER PART III OF THE CONSTITUTION OF INDICA**

2. Article 21 of the Constitution of Indica provides that *no person shall be deprived of his life or personal liberty except according to the procedure established by law.*<sup>2</sup> The word "person" in Article 21 is wide enough to cover not only Indican citizens but also foreigners. The State has an obligation to protect the liberty of foreigners and ensure that this liberty is not deprived except according to the procedure established by law.<sup>3</sup>
3. The sole object of Article 226 is the enforcement of fundamental rights guaranteed under Part III of the Constitution.<sup>4</sup> In the present case, foregoing this guarantee given by the Constitution, the Chief Judicial Magistrate, Tis Hazari Court, Sukh Pradesh has acted on the complaint given by the second respondent herein and summoned the petitioners-accused without there being any prima facie case made out against them and by acting beyond the territorial boundaries of his jurisdiction. Such an act requires consideration by this Hon'ble Court to determine the legality of the aforementioned summons issued to the petitioners-accused. Hence petition under Article 226 is maintainable.

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<sup>2</sup> Article 21, Constitution of Indica, 1950.

<sup>3</sup> Isaac Isanga Musumba & Ors. v. State of Maharashtra & Ors., (2014) 15 SCC 357.

<sup>4</sup> AK Gopalan v. State of Madras AIR 1955 SC 27; Express Newspaper Ltd. v. Union of India (1986) 1 SCC 133.

## 1.2 THE CAUSE OF ACTION AROSE WITHIN THE TERRITORIAL JURISDICTION OF THE HIGH COURT OF SUKH PRADESH

4. It is submitted that the cause of action to challenge the summoning order passed by the Chief Judicial Magistrate before this Hon'ble High Court has arisen within the territorial limits of its jurisdiction.
5. When an order is challenged, the cause of action arises.-
  - a) At the place where the order was made, as well as;
  - b) At the place where its consequences fall upon the person concerned.<sup>5</sup>
6. In the present matter, the summoning order passed by the Chief Judicial Magistrate, Tiz Hazari Court<sup>6</sup> falls within the jurisdiction of the High Court of Sukh Pradesh on both the abovementioned grounds. Furthermore, under Article 226, a High Court can exercise its jurisdiction even if a part of the cause of action arises within its territorial jurisdiction.<sup>7</sup>

## 1.3 REMEDY UNDER ARTICLE 226 IS AVAILABLE IN THE PRESENT MATTER

7. It is submitted that the remedy under Article 226 is available even if the *lis* is between two private parties. The law has always been clear that a writ of certiorari can be issued against the acts or proceedings of a judicial or quasi-judicial body conferred with the power to determine question affecting the rights of subjects and obliged to act judicially.<sup>8</sup>
8. It has been held in the case of *Syed Yakoob v. KS Radhakrishnan*,<sup>9</sup> the grounds for the issue of certiorari have been stated, which includes: when the body concerned proceeds to act without, or in excess of, jurisdiction, or there is an error of law apparent on the face of the record in the impugned decision of the body. In the instant case, it is submitted that the CJM, Tis Hazari Court has acted beyond his jurisdiction which calls for the exercise of the writ of certiorari by this Hon'ble Court.

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<sup>5</sup> Securities and Exchange Board of India v. Alka, AIR 1999 Guj. 221; Birla Institute of Technology v. Yamini Shukla, AIR 1996 All 244.

<sup>6</sup> Moot Propostition, Page 5, Para 11.

<sup>7</sup> ONGC v. Utpal Kumar Basu, (1994) 4 SCC 711.

<sup>8</sup> Surya Dev Rai v. Ram Chander Rai, (2003) 6 SCC 675.

<sup>9</sup> Syed Yakoob v. KS Radhakrishnan, AIR 1964 SC 477 : (1964) 5 SCR 64.

9. Additionally, in the case of *Pushpa Devi Bhagat v. Rajinder Singh*,<sup>10</sup> the Hon'ble Supreme Court held that a plea of lack of jurisdiction where it does not involve any question of fact and is a pure question of law can be raised even before the highest Court. Where the jurisdiction of a body depends upon a preliminary finding of fact in a proceeding for writ of certiorari, the Court may determine whether or not that finding of fact is correct. The reason is that by wrongly deciding such a fact, the body cannot give itself jurisdiction.<sup>11</sup> An error of jurisdictional nature, can be cured, if not patent, for no authority can be allowed to assume jurisdiction by taking a wrong view of law.<sup>12</sup>

#### **1.4 ARGUENDO, THERE EXISTS AN ALTERNATIVE REMEDY, THE SAME IS NO BAR ON THE PRESENT WRIT PETITION**

10. It is submitted before the Hon'ble High Court that the remedy under Article 226 of the Constitution is a discretionary remedy.<sup>13</sup> The Court is vested with power to entertain the petition where there occurs gross miscarriage of justice and effective remedy is not available. This rule of exhaustion of the statutory remedy is not rigid but somewhat flexible and it is primarily a matter of the discretion of the writ court.<sup>14</sup>
11. In the case of *Whirlpool's Corp. v. Registrar of Trade Marks*,<sup>15</sup> it was held by the Apex Court that the jurisdiction of the High Court in entertaining a writ petition under Article 226 would not be affected although there exists alternative statutory remedies. It is further submitted that a writ petition is maintainable when the *lis* involves a public law character and when the forum chosen by the parties would not be in apposition to grant appropriate relief.<sup>16</sup> Question as to when discretionary jurisdiction is to be exercised or refused has to be determined having regard to the facts and circumstances of each case. No hard and fast rule can be laid down in this regard.<sup>17</sup>

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<sup>10</sup> *Pushpa Devi Bhagat v. Rajinder Singh*, (2006) 5 SCC 566 : AIR 2006 SC 2628.

<sup>11</sup> *Raja Brahma Anand v. State of UP*, AIR 1967 SC 1081 : (1967) 1 SCR 373; *State of Madhya Pradesh v. Jadav*, AIR 1968 SC 1186; *Raja Textiles v. ITO, Rampur*, AIR 1973 SC 1362.

<sup>12</sup> *Joharimal Saraogi v. Bakhatawar Singh*, AIR 1967 Man. 1.

<sup>13</sup> *Sripur Paper Mills v. Commissioner of Wealth Tax*, (1970) AIR 1520.

<sup>14</sup> *A.V. Venkateswaran, Collector of Customs, Bombay v. Ramchand Sobhraj Wadhvani*, AIR 1961 SC 1506.

<sup>15</sup> *Whirlpool Corporation v. Registrar of Trade Marks*, AIR 1999 SC 22.

<sup>16</sup> M.P. Jain, *Indian Constitutional Law*, (7th Ed., 2014) at 415.

<sup>17</sup> *Onkar Lal Bajaj v. Union of India*, (2003) 2 SCC 673.

**II. WHETHER THE THEORY OF ALTER-EGO CAN BE APPLICABLE TO A CEO AND CHAIRMAN OF THE HOLDING COMPANY OF ANY CRIMINAL BREACH OF ITS SUBSIDIARY AND/OR GROUP COMPANY, IF THE SAID INDIVIDUAL, PERSONALLY HOLDS A MINORITY STAKE IN THE GROUP COMPANY?**

12. It is most humbly submitted that the theory of *alter ego* is not applicable [2.1] to a CEO and Chairman of the holding Company of any criminal breach of its subsidiary and/or a group company, if the said individual, personally holds a minority stake in the group Company as they are two separate legal entities. Consequently, the theory of vicarious liability has no ground in the present case [2.2] as there is a strict construction of criminal statutes [2.3]. And the corporate veil cannot be pierced under the guise of a single economic entity [2.4].

**2.1 NON-APPLICABILITY OF THE THEORY OF ALTER EGO**

13. The alter ego principle is said to be a means whereby one can identify those persons in a company who can in law be identified as the company.<sup>18</sup> 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. Therefore, the degree and control of the person or body of persons must be so intense that a corporation may be said to think and act through the person or the body of persons.

14. The Supreme Court of India ruled on two aspects in the case of *Iridium India Telecom Ltd. Motorola Incorporated and Ors.*<sup>19</sup> First, it affirmed that a corporation is capable of possessing *mens rea*. Second, it laid down a test - affirming the judgment of the House of Lords in *Tesco Supermarkets Ltd. v. Nattrass*,<sup>20</sup> that the person whose *mens rea* is to be attributed to the corporation must be the directing mind.

15. The "*alter ego*" theory, which is premised on the company's primary liability, was propounded by *Viscount Haldane* as a basis of attribution, distinct from agency or vicarious liability. The Hon'ble Supreme Court of India had considered this theory in *JK Industries v. Chief Inspector of Factories and Boilers*.<sup>21</sup> The Court specifically approved of Lennard's, however it proceeded nevertheless to state that the doctrine of vicarious liability comes into

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<sup>18</sup> *Tesco Supermarkets Ltd. v. Nattrass*, 1971 All ER 127.

<sup>19</sup> AIR 2011 SC 20.

<sup>20</sup> 1971 All ER 127.

<sup>21</sup> (1996) 6 SCC 665.

play.<sup>22</sup> The theory of alter ego is accompanied with either vicarious liability or the identification theory. However, the theory of vicarious liability has no place under criminal statutes.

## 2.2 THEORY OF VICARIOUS LIABILITY

16. The issue of criminal liability of the holding company for acts which would subject the subsidiary to penal consequences has little or no direct authority, but it may be suggested that partly because of the strict construction of criminal statutes and also because of the difficulty of determining evidentially, that the insulation offered by the holding company relation will protect the holding company and its officers from criminal liability in all but the clearest cases of direct intervention, control, and perhaps, commission of the particular criminal acts.
17. In determining the question of criminal liability under specific statutory provisions, it is evident that little weight can be attached to such factors, important as they are in civil liability, as adequate financial basis and separate books, records, etc. Vicarious criminal liability, in the sense used as to civil liability, is not a principle favoured by the criminal law.<sup>23</sup>
18. In the case of *Samsung India Electronics Pvt. Ltd. vs. State of Assam*,<sup>24</sup> various theories of corporate criminal liability were examined and it was stated that there are two ways a corporation can commit a crime:-
  - a) Firstly, where the crime does not require intent, e.g. pollution, food adulteration and several other acts or omissions, which give rise to tortious liability.
  - b) Secondly, where the crimes require intent, e.g. offences against property, in all its forms.
19. It was observed that offences coming under the first category which do not require existence of *mens rea*, are also torts in some form or the other, e.g. creating pollution is a tort of nuisance and fatal accident is a tort of negligence. These acts or omission, therefore, not

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<sup>22</sup> V. Umakanth and M. Naniwadekar, Corporate Criminal Liability And Securities Offerings: Rationalizing The Iridium Motorola Case: Iridium India Telecom Ltd. v. Motorola Incorporated & Ors, National Law School of India Review 2, 2013, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1801628](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1801628)

<sup>23</sup> S. Elson, Legal Liability of Holding Companies for Acts of Subsidiary Companies, 4 Washington University Law Review 333 (1930).

<sup>24</sup> 2012 (4) GLT 546.

only give rise to remedies in civil law, but in criminal law as well. The theory of vicarious liability, therefore, are suited for prosecuting corporations for commission of offences, which do not require *mens rea*.

20. The Hon'ble Supreme Court in the cases of *Maksud Saiyed v. State of Gujrat*,<sup>25</sup> and *S.K. Alagh vs State of U.P.*,<sup>26</sup> considered arguments on the maintainability of prosecution of Managing Directors of corporate bodies for offences, under the Indian Penal Code, which require *mens rea*. It was held that Indian Penal Code does not contain any provision for attracting 'vicarious liability' of the Managing Director or of the Directors of a company, when the accused is a company. It further observed that the question of 'vicarious liability' of the Managing Director and Director would arise only if any provision exists in that behalf in the statute.
21. The Court opined that the Indian Penal Code, having not made any provision making a Managing Director or a Director of a corporate body liable for an offence committed by a corporate body, it is not possible to prosecute a Managing Director or Director of a corporate body for an offence, which requires *mens rea*.

### 2.3 NON-APPLICABILITY OF VICARIOUS LIABILITY; STRICT CONSTRUCTION OF CRIMINAL STATUTES

22. In the case of *Sunil Bharati Mittal vs. Central Bureau of Investigation*,<sup>27</sup> the Hon'ble Supreme Court held that it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless the statute specifically provides so, and the directors cannot be imputed with liability of the corporation.
23. Though the legal proposition laid down in the case of *Standard Chartered Bank v. Enforcement Directorate*<sup>28</sup> laid down that the criminal intent of the "alter ego" of the company, constituted by the personal group of persons that guide the business of the company, would be imputed to the company/corporation. It is applicable only when such a company commits an offence involving *mens rea*, it would normally be the intent and action

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<sup>25</sup> (2008) 5 SCC 662.

<sup>26</sup> *Id* at 668.

<sup>27</sup> *Sunil Bharti Mittal v. Central Bureau of Investigation*, AIR 2015 SC 923.

<sup>28</sup> AIR 2005 SC 2622.

of that individual who would act on behalf of the company. It would be more so, when the criminal act is that of conspiracy.

24. In *Sunil Bharati Mittal*, however this principle is applied in an exactly reverse scenario. Here, company is the accused person and the learned Special Magistrate has through the impugned order summoned the Appellants representing the directing mind and will of each company, and 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.
25. The two circumstances under which an individual can be held liable for the acts of the Company, are as follows.
- a) Firstly, when 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.
  - b) Secondly, is a situation in which he can be implicated in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.
26. The position of attributing liability along with the principle behind such attribution is a vexed question and has an unclear position in law. *Sunil Bharati Mittal*<sup>29</sup> however clarified that a converse scenario is where a corporate officer may be made liable under criminal law for an offence committed by the company. This scenario usually arises when such an officer is “the directing mind and will” of the company. The principle of attribution is not appropriate in this context. Courts have, sought to apply the principle of *vicarious liability*, which can be invoked only if the statute expressly provides for criminal liability of one person (such as a corporate officer) for the acts of another (such as the company).<sup>30</sup>

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<sup>29</sup> *Supra* at 27.

<sup>30</sup> U. Vartolil, Supreme Court on Corporate Officers' Liability, available at <https://indiacorplaw.in/2015/01/supreme-court-on-corporate-officers.html> (last visited on 26/12/2018).

27. 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. Eg. Section 141 of the Negotiable Instruments Act, 1881. In *Aneeta Hada vs. Godfather Travels and Tours Pvt. Ltd.*,<sup>31</sup> 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 vice versa.

28. In the case of *Atul vs. State of Maharashtra*<sup>32</sup> The Bombay High Court reiterated the observation made by the Supreme Court and by referring to various decisions on this point, observed that there is no concept of vicarious liability under the Penal law, unless the said statute covers the same within its ambit. Vicarious liability can be fastened only by reason of statute and not otherwise. It has also observed by the Supreme Court that the Penal Code, 1860, save and except in some matters, does not contemplate any vicarious liability on the part of a person.

29. In the present case, Royal Chivas is the principal and RedStag LLP is an agent, the tripartite contract in signed between Royal Chivas, RedStag and Blue Piper. Petitioner-accused, Mr Mohana Nand, hasn't been a party and the alleged actions of the remaining said accused are being attributed to her. The criminal actions of the subsidiary are being held equivalent as the actions of first petitioner-accused herein. Applying the aforementioned principles, it can be concluded that Mr Mohana Nand cannot be impleaded as an accused because the position of law does not permit the same.

#### **2.4 CORPORATE VEIL CANNOT BE PIERCED UNDER THE GUISE OF SINGLE ECONOMIC ENTITY**

30. In the case of *Shree Pacetronix Ltd. and Anr. Vs. State of Assam and Ors.*<sup>33</sup> The High Court of Gauhati dealt with the question of expanding the horizon of corporate world and the

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<sup>31</sup> 2012 SC 2795,

<sup>32</sup> 2017 ALL MR (Cri) 5028.

<sup>33</sup> (2010) 3 GLR 65.

concept of lifting or piercing the corporate veil in case of necessity. Moreover, whether in a group of companies, even if bound together as subsidiary and a holding company can in law be generally treated as a separate entity. In addition, when a subsidiary is a wholly owned subsidiary of the holding company, can the law ever treat the activities, acts or omissions of the subsidiary as the activities, acts or omissions of the holding company?

31. While answering the present question, several precedents were analysed and it can be observed that in several instances, the liability that arose was civil in nature and were for the purposes of taxation or revenue. The piercing of the corporate veil in order to constitute a single economic entity cannot be likened for attributing criminal liability along the same principles of attaching civil liability.
32. The case of *State of UP and Ors. v. Renuagar Power Co. and Ors.*,<sup>34</sup> points out how judicial pronouncements have departed from the narrow legalistic view, taken in Salomon's case in order to take note of the realities of the situation.
33. Lord Denning in *DHN Food Distributors v. London Tower of Food Hamlets*,<sup>35</sup> referred to many aspects if group of companies are treated together for the purpose of general accounts, balance sheet and profit and loss account and they were treated as one concern. *Professor Gower* reiterates that there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group. This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries.
34. These subsidiaries are bound hand and foot to the present parent company and do what the parent company says. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one, and the parent company. DHN should be treated as that one. So that DHN are entitled to claim compensation accordingly.
35. Therefore in each of the above landmark judgments, the adoption of a narrow legalistic view is for the purposes of treating the parent and group/subsidiary companies as a single

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<sup>34</sup> AIR 1988 SC 1737.

<sup>35</sup> 1976 3 All ER 462.

economic entity and not for the purposes of attributing criminal liability. The *ratio* in the aforementioned cases cannot be dissected from the facts and hence the separate legal entity must be preserved.

36. The applying the theory of alter ego via vicarious liability would be an incorrect step in attributing liability and therefore must not be undertaken. The principle of strict construction of criminal statutes is cardinal and must be retained and the protection of separate legal personalities must not be disturbed. Hence, Mr Mohana Nand cannot be made an accused in the present matter.

**III. WHETHER THE IPC AND/OR CRPC HAS THE JURISDICTION AND/OR AUTHORITY AND/OR PROVISIONS TO SUMMON A FOREIGN NATIONAL WHEN HE ENTERS INTO AN INTERNATIONAL CONTRACT WITH ONE PARTY OF THE CONTRACT IS AN INDICAN NATIONAL AND/OR AND INDICAN COMPANY/FIRM, AND THEREFORE WHETHER SUMMONS ISSUED BY THE CHIEF JUDICIAL MAGISTRATE IS MAINTAINABLE?**

37. It is humbly submitted that the Indican Penal Code and the Criminal Procedure Code, 1973 do not have the jurisdiction to summon a foreign national [3.1] and even if it is allowed in the present matter proper procedure has not been followed according to the proviso under Section 188 of the Criminal Procedure Code [3.2]. Further it is submitted that the Chief Judicial Magistrate, Tis Hazari Court has failed to take proper cognizance of the case [3.3].

**3.1 EXTRA-TERRITORIAL INAPPLICABILITY OF THE INDICAN PENAL CODE, 1860**

38. Section 4<sup>36</sup> of the IPC provides the substantive law of extra-territorial applicability in respect of criminal offences and the procedure to inquire and try it is contained in Section 188 CrPC.<sup>37</sup> Effect of these sections is that an offence committed by an Indican citizen outside the country is deemed to have been committed in Indica. Proviso to Section 188 CrPC, however provides the safeguard for the NRI to guard against any unwarranted harassment by directing, "that, notwithstanding anything in any of the preceding sections of this Chapter, no such offence shall be inquired into or tried in Indica except with the previous sanction of the Central Government".<sup>38</sup>

**Section 188: Offence committed outside Indica.**

*When an offence is committed outside Indica-*

*(a) By a citizen of Indica, whether on the high seas or elsewhere; or*

*(b) By a person, not being such citizen, on any ship or aircraft registered in Indica.*

*He may be dealt with in respect of such offence as if it had been committed at any place within Indica at which he may be found: Provided that, notwithstanding anything in any of the preceding sections of this Chapter, no such offence shall be inquired into or tried in Indica except with the previous sanction of the Central Government.*<sup>39</sup>

<sup>36</sup> S. 4, Indican Penal Code, 1860.

<sup>37</sup> S. 188, Criminal Procedure Code, 1973.

<sup>38</sup> Ajay Aggarwal v. Union of India, AIR 1993 SC 1637.

<sup>39</sup> *Supra* at 37.

39. This section provides for extra-territorial jurisdiction over Indican citizens as well as Non-Indican Citizens.<sup>40</sup> Language of the section is plain and simple. It operates where an offence is committed by a citizen of Indica outside the country. Requirements are, therefore,
- a) Firstly, commission of an offence;
  - b) Secondly, by an Indican citizen;
  - c) Thirdly, that it should have been committed outside the country.<sup>41</sup>
40. The section specifies two cases in which a person is triable for offence committed out of Indica, namely-
- i. When an Indican citizen commits an offence in any place either on the high seas or elsewhere, and
  - ii. When any person, not being such citizen, commits an offence on any ship or aircraft registered in Indica.<sup>42</sup>
41. In the present matter, the petitioners most humbly submit that none of the requirements have been fulfilled. The petitioners are neither Indican Nationals nor have they ever resided in the territory of Indica. Thus, the offence committed, if any, cannot be tried in the Courts of Indica and the Indican Penal Code of 1860 is hence rendered inapplicable in this matter.

### **3.2 PROVISIO UNDER SECTION 188, CRIMINAL PROCEDURE CODE, 1973.**

42. The proviso under Section 188<sup>43</sup> too does not allow the Indican Courts to try a foreign national. The case of *Central Bank of India v. Ram Narain*,<sup>44</sup> dealt with the offence committed outside Indica, by a person who acquired Indican citizenship after he had committed the said offence – It was held that the person had not acquired the citizenship of Indica at the time of offence, and therefore Section 4 of the Indican Penal Code and Section 188 of the Code of Criminal Procedure Code was not applicable.
43. Even if a foreign national could be summoned under Section 188, it is pertinent to note that a sanction has to be taken from the Central Government according to the proviso. In the

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<sup>40</sup> Ratanlal & Dhirajlal, The Code of Criminal Procedure, 673 (18<sup>th</sup> ed., 2007).

<sup>41</sup> *Supra* at 38.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Supra* at 37.

<sup>44</sup> AIR 1955 SC 36.

present matter however, no such sanction has been given before the order was passed by the Chief Judicial Magistrate, Tiz Hazari Court.

44. It is an established principle that according to the terms of Section 188, a court in India cannot try an offence by the virtue of Section 179 merely because a part of the consequences have ensued within its jurisdiction if some part of the offence has been carried in a Native state. Certification by a Political Agent is rendered necessary in this case.<sup>45</sup>
45. If even one of the ingredients of an offence was fulfilled outside the jurisdiction of the Indian Courts, Section 188 is attracted. An order of summons by the Chief Judicial Magistrate without a certificate from the Central Government under this provision, are quashed if all the ingredients of the offence do not take place in the court's jurisdiction.<sup>46</sup>

### **3.3 COGNIZANCE BY THE MAGISTRATE**

46. It is submitted that in the present matter, the Chief Judicial Magistrate, Tis Hazari Court has not taken proper cognizance before issuing summons to the petitioners.
47. In *Pepsi Foods Ltd. v. Special Judicial Magistrate*<sup>47</sup> the Hon'ble Supreme Court held that summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused.
48. While in the case of *Sunil Bharti Mittal v. Central Bureau of Investigation*<sup>48</sup> the court discussed Section 204 of the Criminal Procedure Code, 1973 and the wide discretion that is bestowed upon him in issuing process. This Section relates to commencement of a criminal proceeding. If the Magistrate taking cognizance of a case after consideration of the materials before him (i.e., the complaint, examination of the complainant and his witnesses if present,

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<sup>45</sup> T Fakhruallah Khan v. Emperor, AIR 1935 Mad 326.

<sup>46</sup> Kailash Sharma v. State, 1973 Cri LJ 1021.

<sup>47</sup> (1998) 5 SCC 749.

<sup>48</sup> *Supra* at 27.

or report of inquiry, if any), thinks that there is a prima facie case for proceeding in respect of an offence, he shall issue process against the accused.

49. A wide discretion has been given as to grant or refusal of process and it must be judicially exercised. A person ought not to be dragged into Court merely because a complaint has been filed. If a prima facie case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is unlikely to result in a conviction.
50. However, the words "*sufficient grounds for proceeding*" appearing in the Section are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is prima facie case against accused, though the order need not contain detailed reasons. *A fortiori, the order would be bad in law if the reason given turns out to be ex facie incorrect.*
51. It is most humbly submitted that the Chief Judicial Magistrate has not sufficiently applied his mind to the facts since the jurisdiction of the Indian Penal Code of 1860 and the Criminal Procedure Code of 1973 are both not applicable in the present matter and further the sanction of the Central Government has also not been taken. Hence the order passed issuing the summons to the petitioners are not maintainable.

**PRAYER**

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Wherefore, in the light of the issues raised, arguments advanced and authorities cited, it is most humbly and respectfully prayed before this Hon'ble Court to adjudge that:

- I. That the writ petition is maintainable in the instant matter hence issue any writ in the nature of certiorari or any other writ/ order/ direction to the Chief Judicial Magistrate, Tis Hazari Court, calling for records with regard to the summoning order in question.
- II. That the theory of *alter ego* cannot be applicable to a CEO and Chairman of the holding company for any criminal breach of its subsidiary or group company even if the said individual personally holds a minority stake in the subsidiary or group company.
- III. That the IPC and/or CrPC does not have Jurisdiction and/or Authority and/or Provisions to summon a foreign national when he enters into an international contract with one party of the contract is an Indian national and/or an Indian Company/Firm, and therefore the summons issued by the Chief Judicial Magistrate are not maintainable.

**AND/OR**

Pass any other order it may deem fit, in the interest of Justice, Equity and Good Conscience.

*All of which is most humbly and respectfully submitted.*

**Place:** Sukh Pradesh, Indica

S/d-

COUNSELS FOR THE PETITIONERS