

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

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

*In association with*

**RostrumLegal**

*On*

**January 04<sup>th</sup> to 06<sup>th</sup>, 2019**

**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 RESPONDENTS**

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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 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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2	G.W. Paton, A Textbook on Jurisprudence (4 <sup>th</sup> ed.).	21
3	V.N. Shukla, Constitution Law of India (11 <sup>th</sup> ed. 2008).	-
4	H.M. Seervai, Constitutional Law of India (4 <sup>th</sup> ed. 2004).	-
5	Ratanlal & Dhirajlal, The Code of Criminal Procedure, 673 (18 <sup>th</sup> ed., 2007).	-
6	Gaur, KD, Criminal Law: Cases and Materials, (6 <sup>th</sup> ed. 2009).	-
7	Ratanlal & Dhirajlal, The Indian Penal Code, (33 <sup>rd</sup> ed. 2011).	-
8	D.D. Basu, Constitution of India (8 <sup>th</sup> ed. 2009).	-

~STATUTES~

SL. No.	NAME	PAGE(S)
1	The Constitution of India, 1950	-
2	The Code of Criminal Procedure, 1973	-
3	The Indian Penal Code, 1860.	-

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1	M Aiyar, P Ramanatha, <i>The Law Lexicon</i> , (2nd Ed. 2006)	-



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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>	16
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**STATEMENT *of* JURISDICTION**

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The Counsel for the Respondent, most humbly and respectfully, submit that this Hon'ble High Court of Sukh Pradesh, Indica does not have 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 the Respondents challenge the claims made by the Petitioner. Further, 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

**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 the Petitioners against the Respondents is not maintainable before the Hon'ble High Court of Sukh Pradesh, Indica as the Hon'ble Court does not have the requisite jurisdiction to entertain the petition and that judicial orders are not amenable to a writ of *certiorari* under Article 226.

**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 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. Further, the application of the theories of corporate criminal liability lead to the guilt of the petitioners herein. That mere technicalities of law cannot be conveniently used to hinder the piercing of the corporate veil. That the issue is a question of law and fact and the holding company can be made liable for the criminal breach of its subsidiary or group company.

**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 maintainable because the offence has been committed in the territory of Indica and hence the Indican Penal Code of 1860 is applicable. Further, the nationality of the person committing the crime is immaterial & the Indican Penal Code is applicable to every 'person'. And, the provisions of Criminal Procedure Code, 1973 under Section 188, have 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. The writ petition filed by the Petitioners against the Respondents is not maintainable before the High Court of Sukh Pradesh, India as the Hon'ble Court does not have the requisite jurisdiction to entertain the petition [1.1] and that judicial orders are not amenable to a writ of *certiorari* under Article 226 [1.2].

**1.1 THE HON'BLE HIGH COURT OF SUKH PRADESH LACKS JURISDICTION**

2. It is submitted that the grounds for the issue of *certiorari* have been succinctly laid down by the Supreme Court in *Syed Yakoob v. KS Radhakrishnan*.<sup>2</sup> The writ of *certiorari* is issued, *inter alia* on the following grounds:

*(a) when the body concerned proceeds to act without, or in excess of, jurisdiction, or*

*(b) fails to exercise its jurisdiction, or*

*(c) there is an error of law apparent on the face of the record in the impugned decision of the body; or*

*(d) the findings of fact reached by the inferior tribunal are based on no evidence; or*

*(e) it proceeds to act in violation of the principles of natural justice; or*

*(f) it proceeds to act under a law which is itself invalid, ultra vires or unconstitutional, or*

*(g) it proceeds to act in contravention of the fundamental rights.*

3. In the present writ petition, none of the abovementioned grounds are fulfilled in order to issue a writ of *certiorari* calling for records of the case before the Chief Judicial Magistrate, Tis Hazari Court, Sukh Pradesh or any other direction. The writ petition has been filed only with the oblique motive of delaying the proceedings and is vexatious in nature.

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<sup>2</sup> *Syed Yakoob v. KS Radhakrishnan*, AIR 1964SC 477.



**1.2 JUDICIAL ORDERS ARE NOT AMENABLE TO WRIT JURISDICTION OF THE HON'BLE HIGH COURT**

4. It is submitted that judicial orders passed by inferior or subordinate courts are not amenable to the writ jurisdiction under Article 226 of the Constitution of India before the Hon'ble High Court. In *Radhey Shyam & Anr. v. Chhabi Nath & Ors.*,<sup>3</sup> it was held that the challenge to judicial orders could lie by way of statutory appeal or revision or under Article 227, but not by a way of writ petition under Article 226 or 32. Further, it was held that, the scope of 'inferior court' or 'judicial acts' in respect of which certiorari may be issued is not meant to include judicial orders of civil courts. There are no precedents in India for the High Courts to issue writs to the subordinate courts.
  
5. Additionally, orders passed on the judicial side by the criminal courts pending final judgement are not amenable to the writ jurisdiction under Article 226 of the Constitution of India.<sup>4</sup> Jurisdiction of the High Court under Article 226 is equitable and discretionary, and should be exercised along recognized lines and not arbitrarily keeping in mind principle of equity i.e., it should not be exercised unless substantial injustice has ensued or was likely to ensue.<sup>5</sup> Merely because the Petitioners sent out offers from Sukh Pradesh, made representations from Sukh Pradesh and received a reply/ notice at Sukh Pradesh cannot constitute facts forming an integral part of the cause of action.<sup>6</sup>

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<sup>3</sup> *Radhey Shyam & Anr. v. Chhabi Nath & Ors.*, (2015) 5 SCC 423.

<sup>4</sup> *Chandra Shekhar @ Ram Dheeraj v. State of UP & Ors*, Criminal Misc. Writ Petition No. 6143/2001 (Allahabad High Court, 01/05/2015).

<sup>5</sup> *Eastern Coalfields Limited v. Bajrangi Rabidas*, (2014) 13 SCC 681.

<sup>6</sup> *ONGC v. Utpal Kumar Basu*, (1994) 4 SCC 711.

**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?**

6. It is most humbly submitted that the theory of *alter ego* is 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. Further, the application of the theories of corporate criminal liability lead to the guilt of the petitioners herein [2.2]. That mere technicalities of law cannot be conveniently used to hinder the piercing of the corporate veil [2.3]. That the issue is a question of law and fact and the holding company can be made liable for the criminal breach of its subsidiary or group company [2.4].

**2.1 APPLICABILITY OF THEORY OF ALTER EGO**

7. Principles of attribution are invoked to ascertain the identity of individuals within a company whose mental element will be attributed to that of the company for the purpose of foisting criminal liability.<sup>7</sup> In certain situations the acts or mental state of certain individuals can be attributed directly to the company, where the company carries the primary or direct liability. In such situations, there is no requirement to invoke doctrines of either agency or vicarious liability.
8. 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 Supreme Court of India had considered this theory in *JK Industries v. Chief Inspector of Factories and Boilers*.<sup>8</sup> The Court specifically approved of *Lennard's*, but it stated that the doctrine of vicarious liability comes into play. It held that where the company owns a factory it is the company which is the occupier, but, since company is a legal abstraction without a real mind of its own, it is those who in fact control and determine the management of the company, who are held vicariously liable for commission of statutory

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<sup>7</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>8</sup> (1996) 6 SCC 665.

offences. The directors of the company are, therefore, rightly called upon to answer the charge, being the directing mind of the company.

9. The principle laid down in *Tesco Supermarkets v. Natrass*<sup>9</sup> deals with the nature of personality which by a fiction, the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company.
10. The theory of alter ego (a person's secondary or alternative personality) has witnessed its evolution from *The Assistant Commissioner, Assessment-II, Bangalore & Ors. v. Velliappa Textiles Ltd. & Ors.*,<sup>10</sup> *Standard Chartered Bank v. Directorate of Enforcement*,<sup>11</sup> and culminated in *Iridium India Telecom Ltd. v. Motorola Incorporated & Ors.*,<sup>12</sup>- resulting in a favourable outcome that companies can be attributed with criminality. The criminal intent of the "alter ego" of the company/body corporate i.e. the person or group of persons that guide the business of the company, would be imputed to the corporation.
11. MacNaghten, J. in *Director of Public Prosecutions v. Kent and Sussex*<sup>13</sup> observed that: "*A body corporate is a "person" to whom, amongst the various attributes it may have, there should be imputed the attribute of a mind capable of knowing and forming an intention--indeed it is much too late in the day to suggest the contrary. It can only know or form an intention through its human agents, but circumstances may be such that the knowledge of the agent must be imputed to the body corporate. Counsel for the Respondents says that, although a body corporate may be capable of having an intention, it is not capable of having a criminal intention. In this particular case the intention was the intention to deceive. If, as in this case, the responsible agent of a body corporate puts forward a document knowing it to be false and intending that it should deceive, I apprehend, according to the authorities*

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<sup>9</sup> [1971] 2 W.L.R. 1166.

<sup>10</sup> *The Assistant Commissioner, Assessment-II, Bangalore & Ors. v. Velliappa Textiles Ltd. & Ors.*, AIR 2004 SC 86.

<sup>11</sup> *Standard Chartered Bank v. Directorate of Enforcement*, AIR 2005 SC 2622.

<sup>12</sup> *Iridium India Telecom Ltd. v. Motorola Incorporated & Ors.*, AIR 2011 SC 20.

<sup>13</sup> 1972 AC 153 : (AC p. 156).

*that Viscount Caldecote, L.C.J., has cited, his knowledge and intention must be imputed to the body corporate.”*

12. This theory of alter ego is applicable to a juristic person consequent to the actions of a natural person, since the actions of each is equivalent of the other and the juristic person is vacuum in the absence of human agency. Theories of corporate criminal liability are mechanisms devised to ultimately find the ‘mind’ behind the acts of the company.
13. The actions of the key Managerial personnel of the company deem the said actions to be that of the company itself, and in the present case the actions of Mr Mohana Nand are deemed to be actions of the Royal Chivas Holdings BV by virtue of the position she holds in the company.
14. Holding Key Managerial Personnel liable is equivalent to holding the company liable as they represent are the organs of the company and are the ‘directing mind and will’ of the company.

## 2.2 THEORIES OF CORPORATE CRIMINAL LIABILITY

15. To determine criminality of Mr Mohana Nand for the actions of the group company, the theories of corporate personality are to be considered. In the case *Samsung India Electronics Pvt. Ltd. v. State of Assam*<sup>14</sup>, the Court has discussed the various theories of attributing liability on a company consequent to the undisputed fact that companies can be prosecuted for offences that have *mens rea* as an essential ingredient which is a settled position in law post *Iridium India Telecom Ltd. v. Motorola Incorporated & Ors.*<sup>15</sup>
16. World over, the corporations have been indicted and sought to be prosecuted on the basis of either the theory of ‘*vicarious liability*’ or the ‘*identification theory*’. Some other theories, like ‘*aggregation theory*’ and ‘*corporate culture method*’, have also been explored; but when read in its entirety, it is a hybrid form of the two basic theories i.e. ‘*vicarious liability*’ and ‘*identification*’.
17. There are two ways a corporation can commit crime:-
  - a) Firstly, where the crime does not require intent, e.g. pollution

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<sup>14</sup> 2014 (4) GLT 546.

<sup>15</sup> *Supra* at 12.

b) Secondly, where the crimes require intent, e.g. offences against property.

18. It is easier to attach liability in the first scenario where *mens rea* does not exist. The theories of vicarious liability are however applied, for the actions of agents, employees when the individual's actions were within the scope of his employment; and the individual's actions were intended, at least, in part, to benefit the corporation.
19. The application of the doctrine of '*respondent superior*' to the field of criminal liability has been under severe criticism. In order to appreciate this criticism, it is necessary to note that three conditions are, generally, required to be satisfied to attract the application of the theory of vicarious liability:
- i. Was the act committed within the time and space limits of the agency?
  - ii. Was the offence incidental to, or of the same general nature as the responsibilities of the agent, which the agent was authorized to perform?
  - iii. Was the agent motivated to any degree to benefit the principal by committing the act?
20. The theory of vicarious liability is based on the doctrine of agency. There is, thus, a delegation, by the principal, of his discretion. If the acts are within the limits of instructions, the principal may be held liable in criminal law. This question is a question of fact and can be answered subsequent to examination of evidence.
21. The second theory is *identification theory* and notable events in the history of corporate criminal liability with the decision in *HL Bolton (Engg) Co. Ltd. Vs. T. J. Graham and Sons*,<sup>16</sup> the 'identification theory', which we recognize today, is substantially an outcome of this judgment, wherein *Lord Denning* held that a company may, in many ways, be compared to a human body, for, a company must be held to have a brain and nerve center, which controls what the company does. Similarly, a company has the hands, which hold the tools and act in accordance with the directions from the nerve center.
22. However, some of the persons, in the company, are mere servants, who are nothing more than hands to do the work and cannot be said to represent the mind or will of the company; but there are some others, such as, directors and managers, who represent the directing mind and will of the company. Hence, in such circumstances, the state of mind of these directors or managers is the state of mind of the company and is treated by law as such.

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<sup>16</sup> 1956 All ER 624.

23. The foundation for the above observations of Lord Denning was laid down in 1915, in the case of *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum*<sup>17</sup> where Viscount Haldane, L. C., described Mr. Lennard as the '*directing mind and will*' of the company. Because of the fact that Mr. Lennard was found to be the directing mind as well as the will of the company, it was held that the company could not dissociate itself from him so as to say that there was no actual fault or privity on the part of the company.
24. The basic distinction, between the two theories of corporate criminal liability discussed above is the *bottom-up and top-bottom* approach. While in 'vicarious liability', the wrongs begin from the agent below and carried to the Managing Authority at the top; whereas, in 'identification theory', the conspiracy ought to start from the top and spill over to the agents, who commit acts pursuant to such conspiracy.
25. Based on the criminal complaint filed before the Chief Judicial Magistrate, it was averred that Mr Mohana Nand has participated in the negotiating process with the other two parties and this indicates control of the group company by the KMP of the holding company which hasn't been disputed by the petitioners in the instant case.
26. The identification theory can very well be applied and there lies no dispute in its application to criminal cases. The application of vicarious liability however is under criticism due to criminal statutes being construed strictly. However, if the aforementioned questions are answered, and based on perusal of evidence, there lies a possibility of Petitioner-accused number 1 being held liable.
27. While applying both the theories, the question of attribution is a question of fact. The only two ways to hold a body corporate liable is by means of ascending through vicarious liability or identification theory. Both the theories can result in the theory of alter ego being applied to hold the secondary personality being held liable. In the present case, it can be attributed to the CEO and Chairman of the Holding company who is the KMP of the holding company and has exercised substantial control in the affairs of the group company and is an undisputed fact.

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<sup>17</sup> [1915] A.C. 705.

### **2.3 TECHNICALITY OF LAW CANNOT BE USED TO HINDER PIERCING OF CORPORATE VEIL**

28. The holding-sub subsidiary company relationship is couched with the attractiveness of limited liability, the corporation will however will be looked upon as a legal entity as a general rule, until sufficient reason to the contrary appears; but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of individuals.<sup>18</sup>
29. For all fictions of law are introduced for the purpose of convenience and to sub serve the ends of justice. When they are urged to an intent and purpose not within the reason and policy of the fiction, they must be disregarded by the courts.<sup>19</sup>
30. *Concession theory* amongst other theories of corporate personality, recognizes that legal personality of body corporates is derived from law<sup>20</sup> and that law grants a concession by doing so. While this concession is granted for a purpose, and subverting that purpose allows law to pierce the very same corporate veil.
31. In addition to various Supreme Court judgments adopting a narrow legalistic view of separate personality of companies, in the present case the petitioners have stated that by virtue of the separate personality of holding-sub subsidiary companies, the petitioners should have the benefit of not sharing liability. However, this concession granted by law, might very well be withdrawn if the actions undertaken by the company sub serve the ends of justice.

### **2.4 QUESTION OF FACT AND LAW; ACTUAL FAULT AND PRIVITY**

32. In the corporate jurisprudence, there have been several cases which have varied decisions and it has been observed that where there has been substantial control, the liability has been in favour of the holding company. The question then is raised, *what participation in the affairs of the subsidiary can be deemed so extraordinary or abnormal that the corporate*

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<sup>18</sup> S. Elson, Legal Liability of Holding Companies for Acts of Subsidiary Companies, 4 Washington University Law Review 333(1930) .

<sup>19</sup> *Ibid.*

<sup>20</sup> G.W. Paton, A Textbook on Jurisprudence, 411(4<sup>th</sup> ed.).

*insulation will be of no avail?* The issue is not entirely as to the form that the control has taken, but is also one as to its substance and extent.

33. In the case of *Berkey v. Third Ave. Ry.*<sup>21</sup> J. Cardozo held that the parent was not liable for the tort of the subsidiary and that the latter was not the alter ego of the former, in spite of the use of the one company's assets by the other, the unity in operation, and the general interchangeable names. This was accompanied with a strong dissenting opinion and the cases that followed had diverging decisions based on the facts.
34. In *Joseph R. Foard Co. v. State of Maryland*<sup>22</sup> the parent was held liable for damages caused by the negligence of an employee of the subsidiary company.
35. In cases where there is difficulty in determining the existence of separate management structures, the doubt has been resolved in favor of liability of the dominant company. This was held in the case *Oriental Investing Co. v. Barclay*<sup>23</sup>, where the parent may not successfully evade tort liability where it uses the subsidiary as a construction and operating unit, if by the contract with the subsidiary it milks the latter of all profits and at the same time makes itself a secured creditor of the subsidiary by a mortgage on its property, and reserves a right of direct interference. The Court in *Erickson v. Minnesota & Ontario Power Co.*<sup>24</sup> held that the parent company may not do business through a subsidiary and at the same time safeguard itself against concomitant obligations, thereby throwing all the risk on persons coming in contact with the subsidiary. One cannot eat the business pie and still have it.
36. The case of *State of UP & Ors. V. Renusagar Power Co. & Ors.*,<sup>25</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. The Supreme Court observed that when the question of fraud having been committed by a company is raised or when a question of legal obligation arises, the courts have, acting under the principle of public policy or, on the principle that the device, used for perpetrating frauds or evading legal obligations, shall be

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<sup>21</sup> (1926) 244 N. Y. 84, 94, 155 N. E. 58, 61.

<sup>22</sup> 219 Fed. 827 (C. C. A. 4th, 1914).

<sup>23</sup> 64 S.W. 80 (Tex. Civ. App. 1901).

<sup>24</sup> 4134 Minn. 209, 158 N.W. 979 (1916).

<sup>25</sup> AIR 1988 SC 1737.



treated as nullities, lifted the corporate veil and looked behind the company to find out as to who the real player in the game is.

37. The Hon'ble judges also referred to the case of *Harold Holdsworth & Co. (Wakefield) Ltd. v. Caddies*<sup>26</sup> wherein *Lord Reid*, observed that though it was argued that the subsidiary companies were separate legal entities, each under the control of own board of directors, that in law the board of the appellant company could not assign any duties to anyone in relation to the management of the subsidiary companies, and that, therefore, the agreement cannot be construed as entitling them to assign any such duties to the respondent. This was taken to be too technical an argument. This is an agreement in *re mercatoria*. And it must be construed in the light of the facts and realities of the situation.
38. Ordinarily, therefore, the question as to whether a subsidiary can or cannot be treated as an independent legal entity is a question of fact; but, in a given case, it may be a mixed question of fact and law.<sup>27</sup>
39. Therefore, based on the above contentions raised, it can be humbly submitted that the holding company can be held liable for the acts of the subsidiary/ group company when it exercises substantial control in the affairs of the company. Whether the said company exercised significant control is a question of fact and can be answered only upon examination of evidence.
40. Subsidiary companies are accustomed to act under the directions of the holding company, and the holding company's key managerial personnel can be categorized as 'shadow director' of the subsidiary company. The accused can be held liable by applying the theory of alter ego via 'vicarious liability' or 'identification theory' for any breach of its subsidiary/group company depending upon the substantial control it exercises.

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<sup>26</sup> (1955) All ER 725.

<sup>27</sup> *Shree Pacetronix Ltd. & Anr. v. State of Assam & Ors*, (2010) 3 GLR 65.

**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?**

41. It is humbly submitted that the summons issued in the present matter are maintainable because the offence has been committed in the territory of Indica and hence the Indican Penal Code of 1860 is applicable [3.1]. Further, the nationality of the person committing the crime is immaterial [3.2] & the Indican Penal Code is applicable to every 'person' [3.3]. And, the provisions of Criminal Procedure Code, 1973 under Section 188, have been complied with for summoning foreign nationals [3.4].

**3.1 INDICAN PENAL CODE HAS JURISDICTION UNDER THE TERRITORIAL PRINCIPLE**

42. The Indican Penal Code declares that every person shall be liable to punishment under the code and not otherwise for every act or omission contrary to the provisions of the code of which he shall be guilty within Indica.<sup>28</sup>
43. As far as jurisdiction in criminal matters is concerned, by and large it depends upon the territorial aspect of the crime. It was observed by the court<sup>29</sup>: The general rule in criminal law is strictly territorial- so that a man is subject to only criminal law of the country where he is, and that his conduct there whether by acting, speaking or writing shall be judged of as criminal or not by that law and no other. This position has two exceptions namely when the crime commences outside the territory but concludes within it or has an effect in it and when the crime commenced within the territory but has an effect or is concluded outside it.<sup>30</sup>
44. In the present matter, the respondent, RedStag LLP is a firm based in Sukh Pradesh, Indica and has filed a criminal complaint against the appellants before the Chief Judicial Magistrate, Tis Hazari Court, Sukh Pradesh, Indica due to denial of rightful trade commission and other offences mentioned in the criminal complaint.<sup>31</sup> Since RedStag is situated in the territory of Indica and the payment was denied to RedStag, the offence has

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<sup>28</sup> S. 2, Indican Penal Code, 1860.

<sup>29</sup> HM Advocate v. Hall, (1881) 4 Couper 438.

<sup>30</sup> Surya Jyoti Gupta "Civil & Criminal Juris in the Internet", XXIX Indian Bar Review (2002) 45-71 at 61.

<sup>31</sup> Moot Proposition, Page 5, Para 10.

taken effect in Indica and hence the Indican Penal Code of 1860 is bound to exercise its territorial jurisdiction.

### **3.2 NATIONALITY OF PERSON COMMITTING CRIME IS IMMATERIAL**

45. Through the jurisprudence of criminal jurisdiction in the Indican Courts, it is not only a laid down law but also a well-developed principle that the nationality of the person committing a crime is immaterial.
46. A foreigner committing an offence in Indica will be amenable to the Indican law and will be punishable under this section<sup>32</sup>, although he may not be physically present in Indica at the time of the offence.<sup>33</sup> A foreigner committing an offence in Indica will be guilty though he may be ignorant of the Indican laws.<sup>34</sup> He cannot plead ignorance of Indican Law.<sup>35</sup> However, the ignorance of law may be pleaded in mitigation of the sentence.<sup>36</sup> The section does not mean that the offender should be physically present in Indica at the time of the offence. The section only means that the offence must take place in Indica although the offender is outside.<sup>37</sup> This principle viz., that the offender need not be physically present in Indica at the time of the commission of the offence in Indica, also applies to foreigners and not only Indicans. This position has also been established by Supreme Court in Mubarak Ali's case.<sup>38</sup>
47. It has also been held that foreigners who initiate offences<sup>39</sup> abroad that take effect on Indican territory are amenable to Indican jurisdiction.
48. The Supreme Court explained in *Mobarik Ali v. The State of Bombay*<sup>40</sup> that the basis of jurisdiction under S. 2<sup>41</sup> is the locality where the offence is committed and that the corporeal presence of the offender in Indica is immaterial.

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<sup>32</sup> *Supra* at 28.

<sup>33</sup> *Mobarik Ali v. The State of Bombay*, AIR 1957 SC 857.

<sup>34</sup> *Nazar Mohammad v. State*, AIR 1953 Panj 227 (231); 1954 Cri LJ 1542.

<sup>35</sup> *Jitendranath Ghosh v. The Chief Secretary to the Government of Bengal*, (1932) 60 Cal.

<sup>36</sup> *Supra* at 33.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Chotelal v. Emperor*, 36 Bora. 524; *Wheeler v. Emperor*, 29 Cr LJ 1.

<sup>40</sup> *Supra* at 33.

<sup>41</sup> *Supra* at 28.

49. The appellants in the present matter have contended that they are non-citizens of Indica and have never resided in Indica,<sup>42</sup> however the principle followed by the Indican Penal Code of 1860 is that the citizenship or residence of the persons committing the crime is immaterial and hence culpability of the offence can be checked by using the same Code.

### 3.3 THE INDICAN PENAL CODE IS APPLICABLE TO 'EVERY PERSON'

50. The expression "every person" in Section 2 includes all persons without limitation and irrespective of nationality, allegiance, rank, status, caste, colour or creed,<sup>43</sup> excepting such persons as may be specially exempted under statute, as under the constitution of Indica or under international law, such as foreign princes, ambassadors etc.<sup>44</sup>

51. In *State of Maharashtra v. Syndicate Transport Company*<sup>45</sup> the Bombay High Court held that a body corporate ought to be indictable for criminal acts or omissions of its directors or authorised agents or servants, whether or not they involve *mens rea*.

52. Thus, even the companies of which the appellants are key managerial persons can be made liable under the Indican Penal Code.

### 3.4 PROVISIO UNDER SECTION 188 OF THE CRIMINAL PROCEDURE CODE, 1973

53. The object of requiring the sanction of the Central Government appears to be to prevent the accused person being tried all over again for the same offence in two different places. This object is to be secured by refusing to extradite the offender if he is wanted for being tried in a foreign country subsequent to his trial in an Indican Court, or by refusing to sanction a prosecution against him as if he has been already tried in a foreign country in respect of the same offence.

54. In *Ajay Aggarwal v. Union of India*<sup>46</sup> appellant a non-resident Indican (NRI) who never visited Indica in relation to criminal conspiracy contended that no proceedings can be initiated against him without approval of Central Government but the Supreme Court held that sanction under Section 188 is not a condition precedent to take cognizance of the

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<sup>42</sup> Moot Proposition, Page 6, Para 12.

<sup>43</sup> *Adams v. Emperor*, (1903) ILR 26 Mad 607 (617) SB.

<sup>44</sup> *Ibid*.

<sup>45</sup> 1964 (2) Cri LJ 276.

<sup>46</sup> *Ajay Aggarwal v. Union of India*, AIR 1993 SC 1637.

offence.<sup>47</sup> It means that the consent of Central Government may be obtained before the trial begins, it is not necessary that the consent should be obtained before taking cognizance.

55. In the year 2004, the Hon'ble Supreme Court in the Case of *Om Hemrajani v. State of U.P. & Anr.*<sup>48</sup> interpreted the expression 'at which he may be found' in the aforesaid section. Observation of Supreme Court: '*The scheme underlying Section 188 is to dispel any objection or plea of want of jurisdiction at the behest of a fugitive who has committed an offence in any other country. If such a person is found anywhere in India, the offence can be inquired into and tried by any Court that may be approached by the victim. The victim who has suffered at the hands of the accused on a foreign land can complain about the offence to a Court, otherwise competent, which he may find convenient. The convenience is of the victim and not that of the accused. It is not the requirement of Section 188 that the victim shall state in the complaint as to which place the accused may be found. It is enough to allege the accused may be found in India. The Court where the complaint may be filed and the accused either appears voluntarily pursuant to issue of process or is brought before it involuntarily in execution of warrants, would be the competent Court within the meaning of Section 188 of the Code as that Court would find the accused before him when he appears. The finding has to be by the Court. It has neither to be by the complainant nor by the Police. The section deems the offence to be committed within the jurisdiction of the Court where the accused may be found.*'

56. Thus, it is most humbly submitted that it is not necessary to take the sanction under Section 188 of the Criminal Procedure Code before the order of summons by the Chief Judicial Magistrate. The offences have all concluded in and affected a citizen of India and hence by the principle of territorial jurisdiction and non-applicability of sanction under Section 188, the summons issued by the Chief Judicial Magistrate are maintainable.

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<sup>47</sup> *Id.*

<sup>48</sup> AIR 2005 SC 392.

**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 not maintainable in the instant matter hence not to issue any writ in the nature of certiorari or any other writ/ order/ direction to the Chief Judicial Magistrate, Tis Hazari Court, with regard to the summoning order in question.
- II. That the theory of *alter ego* can 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 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 Indian national and/or an Indian Company/Firm, and therefore the summons issued by the Chief Judicial Magistrate are 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 RESPONDENTS