
(1973) 01 BOM CK 0009

In the Bombay High Court

Case No : Criminal Application No. 633 of 1972

Esso Standard Inc.

APPELLANT

Vs

Udharam Bhagwandas Japanwalla

RESPONDENT

Date of Decision : 19-01-1973

Acts Referred:

Penal Code, 1860 (IPC) — Section 109, 114, 34, 417, 420

Citation : (1975) 45 CompCas 16 : (1973) MhLj 1022

Hon'ble Judges : Vaidya, J;D.M. Rege, J

Bench : Division Bench

Advocate : M. B. Kadam, Asst. Government Pleader, R. Jethmalani, for the Appellant; M.V. Paranjpe, for the Respondent

Judgement

Vaidya, J.—This is an application u/s 561 of the Criminal Procedure Code. The applicant is a public limited company by name, Esso Standard Inc., registered in the State of Delaware, U.S.A., and having its branch office at 17, Jamshedji Tata Road, Bombay-20. On February 23, 1972, respondent No. 1, Udharam Bhagwanda Japanwalla, as a constituted Attorney of Venus Polish, filed a complaint in the court of the Presidency Magistrate, 28th Court, Esplanade, Bombay, alleging that, (1) the applicant, Esso Standard company which was described in the complaint as accused No. 1, (2) one Z. A. Merchant, an officer of the company who was described as accused No. 2, (3) one R. K. Gupta, a sales officer of the company, described as accused No. 3, (4) and R. D. Vyas, sales manager of the company, described as accused No. 4, and (5) C.B. Thomas, general manager of the company, described as accused No. 5, committed offences under sections 420, 417 read with sections 34, 109 and 114 of the Indian Penal Code. The learned Magistrate issued summonses on a perusal of the complaint and hearing the complainant. The complaint is numbered as Case No. 18/S of 1972. It is common ground that accused Nos. 1 to 3 were served with summonses but accused Nos. 4 and 5 who are residing in the United States are not yet served. On July 3, 1972, respondent No. 1 moved the Magistrate for extradition proceedings being taken against accused Nos. 4 and 5.

2. The above application is filed by Esso company contending that the continuation of the proceedings before the Magistrate is a gross abuse of the court's process and praying that in exercise of the powers of this court u/s 561-A of the criminal procedure code the proceedings in Case No. 18/S of 1972, pending in the court of the Presidency Magistrate, 28th court, Esplanade, Bombay, should be quashed and the complaint dismissed, or, in the alternative, the process issued by the learned Magistrate be set aside and the complaint required to be disposed of after holding an inquiry u/s 202 of the Criminal Procedure Code. The application of the Company is opposed by respondent No. 1 Mr. M. B. Kadam, learned Assistant Government Pleader, appearing for the State of Maharashtra, supports the application.

3. Mr. Jethmalani, the learned counsel appearing for the applicant company, submitted that having regard to the categories of cases settled, though not exhaustive of all other cases as mentioned in *R. P. Kapur v. State of Punjab*, the complaint filed by respondent No. 1 squarely falls within the second category, i.e., the category of cases where the allegations in the first information report or the complaint even if they are taken on their face value and accepted in their entirety do not constitute an offence alleged and, apart from that, the ends on justice require that the proceedings pending before the Presidency Magistrate should be quashed against the applicant-company and its officers who are mentioned as accused Nos. 2 to 5. He submitted that on the face of it the complaint disclosed no criminal offence under any section of the Indian Penal Code under which process has been issued by the learned Magistrate, viz., sections 420, 417 read with sections 34, 109 and 114 of the Indian Penal code because the allegations made in the complaint were wholly false and even assuming them to be true they did not establish the ingredients of the said offence. He argued that the dispute between the parties was at the worst a civil dispute and even according to the complaint the claim of the complainant was time barred. He pointed out that in the year 1963, with respect to the same dispute, respondent No. 1 made a claim of Rs. 85,000; in May 1969, he made a claim of Rs. 7,56,840 and in February, 1971, he inflated it to Rs. 22,56,840 with the ulterior motive of blackmailing the officers of the applicant-company and to force a settlement of a frivolous and time-barred claim. He argued further that although the complaint repeatedly refers to assurances and representations which were false, it is not stated as to which of the representations was false and in view of this it was clear that the complaint was abusing the process of the court by king the court to issue process particularly when the complaint filed earlier on the same facts in the same court before another Presidency Magistrate was withdrawn after issuing process of December 8, 1971 and was, therefore, dismissed by the learned Magistrate. He submitted that even on the allegations of the complaint it was obvious that the alleged offences took place in the year 1963, and it was discovered by the complainant on February 8, 1968 and the learned Presidency Magistrate had not exercised his discretion properly in issuing process without even making an enquiry u/s 202 on a state complaint filed in

1972. Mr. Jethmalani argued that although there is reference in the complaint to both section 417 and section 420, section 420 is the more serious section which will be attracted if the complaint wants to suggest cheating as the offence by the allegations made in the case; and the complaint would be barred against the applicant-company in view of the decision of this court in *State of Maharashtra v. Syndicate Transport Co. Ltd.* Further relying on the principles enunciated regarding the liability by a corporation or company in *Tesco Supermarkets Ltd. v. Nattrass*, he submitted that the complaint was liable to be dismissed against the applicant-company on the ground that there was no allegation in the complaint that accused Nos. 2 to 5 were acting under authority to the company and further the no act was attributed to them which could be the act of the company. He further submitted that having regard to the allegations made in the complaint that the offences were committed by all the accused with a common intention the complaint was liable to be dismissed against all the accused as the company could not be indicted on charge u/s 420 or section 417 of the Indian Penal Code in the facts and circumstances of the case. Mr. Jethmalani further submitted that, although the applications is filed only by Esso standard Incorporated Co., the ends of justice require that the proceedings should be quashed against all the accused and this court has power to quash the proceedings even against persons who had not moved this court u/s 439 of the Criminal Procedure code as held in *Parbati Devi v. State*.

4. These arguments of Mr. Jethmalani were sought to be repelled by Mr. Paranjpe, learned counsel for the complainant, reading the entire complaint and by contending that the allegations made in the complaint prima facie fulfilled all the ingredients of section 417 of the Indian Penal code against all the accused including the company. He submitted the though the company cannot be indicated u/s 420 of the Penal Code as held in *State of Maharashtra v. Syndicate Transport Co. Ltd.*, the applicant-company and its officers were liable for criminal action in the facts and circumstances having regard to the nature of the offences disclosed in the allegations in the complaint, the relative position of the officers vis-a-vis the company and other relevant facts and circumstances which clearly showed that the company had meant or intended to cheat the complainant through its agents, Nos. 2 to 5.

5. In view of these contentions it is necessary for us to consider the allegations made by the complaint in the complaint. The complainant claims to be a merchant and manufacturer of polishes and car cleaners. On February 16, 1961, one, A. G. Neff acting for and on behalf of Standard Vacuum Oil Company entered into an agreement with the complainant. Under the agreement two products of Standard Vacuum Oil Company, viz., (1) Stanclen (car body cleaner) and, (2) Stanwax (car body polish) were to be manufactured by the complaint on a royalty basis of Rs. 3 per dozen. The said Neff had assured the complainant that this agreement, though mentioned to be for one year, should be taken for ever, and even if he was not in office representing Standard Vacuum Oil Co., the complainant should contact and convey his assurances to his successors in office

who were bound to honour the assurances given by him. As desired by the company, a separate concern, viz., James Laboratory, Post Bag. No. 10115, Bombay-1, was started by the complainant.

6. Standard Vacuum Oil Co. was converted into Esso Standard Eastern Incorporated Co., in or about March, 1962. In accordance with clause 13 of the agreement with Standard Vacuum Oil Co., the company was bound to reimburse the complainant's company with the actual cost of all empty and all filled containers surrendered by the complainant's company on the expiry of the agreement because of the change in the name of company. The complainant, therefore, lodged a claim of Rs. 50,000 against the applicant-company for 20,000 tins most of which were filled and became unsaleable because of the change of the name of the applicant-company. Accused No. 2, Z.A. Merchant, tried through the branches of the applicant-company to sell those 20,000 tins but he failed in his attempt. There was no sale of these tins up to June, 1962. The complainant, therefore, insisted that Rs. 50,000 be paid to him as the cost of 20,000 unsold tins. But accused No. 2 made a representation to the complainant that the applicant-company would make a new agreement with him for Esso polishes for a period of 50 years if he took upon himself the entire loss of Rs. 50,000 which was the cost of the filled and empty 20,000 tins. The complainant agreed to this arrangement.

7. Relying on representation made by accused No. 2 on June 26, 1962, the complainant wrote letter to the company placing on record the representation made by accused No. 2 and agreeing to remit his claim of Rs. 50,000 in consideration of the applicant-company entering into a new agreement with the complaint for 50 years. Further, as a result of this arrangement, the complaint was induced to pay the royalty amounting to Rs. 2,452.50 which was payable by the complainant to Standard Vacuum Oil Co.

8. However, accused No. 2 delayed completing the agreement. The complainant wrote a letter on August 30, 1962, requesting him to expedite the matter and arrange for executing an agreement for 50 years. The complainant informed the applicant-company that as per their wishes he had already placed orders for containers subject to the final approval of the colour of the tin by the applicant-company. At that time accused No. 4, R. D. Vyas, was the sales manager. He transferred the file of correspondence with the complainant to accused No. 3, R. K. Gupta. Accused No. 3 asked the complainant to change the names of the products three times, i.e., from (1) Auto-Wax, Auto-Gloss and Auto-Cleaner to (2) Kar-Wax, Kar-Gloss and Kar-Cleaner, and ultimately to (3) Car-Wax, Car-Gloss and Car-Cleaner. All these preliminaries were finished; and the complainant placed on record by letter dated October 15, 1962, the changes suggested by accused No. 3. According to the instructions of accused No. 3, the complaint further got the tins printed so that in four weeks Esso polishes should be out in the market. At that time the complaint told accused No. 3 that a written agreement for 50 years should be executed first and he could proceed with the

printing of new Esso tins after this as it would entail an amount of about Rs. 40,000 which the complainant was not prepared to invest until he was assured of continuance of the agreement for 50 years. Accused No. 3 told him that he had no reason to worry and that the agreement for 50 years would definitely be executed. He asked the complainant to give him the old original agreement with Standard Vacuum Oil Co. which would enable him to have a fresh agreement prepared. The complainant told accused No. 3 that he was not sure where the original was but he would send a copy which was lying in his office file. Accused No. 3 said that that would do but asked the complainant to proceed with the printing of the tins at once. Relying on this assurance the complainant invested Rs. 35,000 by getting 75,000 this prepared with new design and name.

9. In spite of this, accused No. 3 did not prepare the agreement for 50 years. On the contrary, he insisted on the complainant signing a one-year agreement and asked the complainant to cancel the proposed para. 13 of the agreement which entitled the complainant to be reimbursed in respect of the actual cost of all empty and all filled containers surrendered by the complainant's company. Surprised at this the complainant thought that it would be better to collect Rs. 50,000 plus Rs. 35,000 invested in Esso printed tins. Hence, on January 3, 1963, he wrote a registered letter with acknowledgment due to accused No. 4, R. D. Vyas, general sales manager, putting on record the fact that he had agreed to bear the loss of Rs. 50,000 consequent upon the change in the name of the company on the representations made by accused No. 2, Merchant, that the applicant-company would enter into an agreement with the complainant's company for 50 years. The complainant wrote to accused No. 4, Vyas, that unless the promise of 50 years' agreement and the retention of para. 13 of the old agreement were agreed to, he would insist on claiming Rs. 50,000 which was his loss when the company changed its name and Rs. 35,000 being the investment made by the complainant in the new Esso tins as a result of the assurances given to him by the officers of the company, i.e. accused No. 2 and accused No. 3.

10. On receipt of this letter accused No. 4 sent for the complainant and informed him personally that he would accede to his demands and directed Patel, who was also an officer in the company, to prepare the agreement for 50 years with clause 13 in it. Mr. Patel prepared the agreement and sent it to the complainant for approval. After approval, the complainant returned the draft with two stamped papers on February 5, 1963. Thereafter, the complainant went to have a meeting with accused No. 4, Vyas, and Patel. At that meeting accused No. 4 Vyas, told the complainant that in view of the fact that they were entering into an agreement with the complainant for 50 years, the complainant should withdraw the registered letter dated January 3, 1963, demanding Rs. 85,000. Believing accused No. 4 the complainant gave a letter withdrawing his demand of Rs. 85,000 contained in his letter dated January 3, 1963.

11. February 8, 1963, was fixed as the date for signing of the agreement. The complainant wrote on February 7, 1963, that he would be coming to the

company's office for the purpose along with his brother who was the proprietor of Venus Polishes. On February 8, 1963, the meeting took place. The complainant accompanied by his brother went to sign the agreement. He was shocked to find that the agreement which was handed over to him for his signature by accused No. 3 was not for 50 years but only for one year. The complainant got upset. He searched for Patel. He could not find Patel or accused No. 4. He insisted on a mention of 50 years in the agreement and refused to sign the agreement and demanded Rs. 85,000. Both accused No. 3 and No. 2 told him that the legal department of the applicant-company had said that they could not take the agreement for 50 years and instead they had suggested the mention of the words "the agreement is renewal every year". Accused Nos. 2 and 3 told the complainant that these words were in substance intended to give effect to the agreement for 50 years as the agreement was renewable automatically every year and the complainant was in possession of the letter dated June 27, 1962, incorporating the arrangement for 50 years. They also said that only if there was any breach of the agreement that the company could exercise option of termination by referring to para. 14 of the said agreement. In view of these assurances and representations made by them and accused Nos. 2 and 3 and similar representations made by them and No. 4 earlier and without suspecting that they were making false representations and giving the complainant false assurances, the complainant signed the agreement.

12. After the execution of the agreement, the complainant started manufacturing and marketing the products which were the subject-matter of the agreement. Differences arose between the officers of the company and the complainant. The complainant approached with his difficulties accused No. 4 whose attitude towards the complainant was unco-operative. The complainant, therefore, complained to the general manager, Thomas accused No. 5, by his letter of August 3, 1964, who wrote back suggesting that the complainant should contact accused No. 4. On September 21, 1964 the complainant contacted accused No. 4. What followed is described as follows by the complainant !

"He heard me well and promised to solve all my difficulties and asked accused No. 3, Gupta, to look into the matter. I again requested for 50 years' agreement, and in reply he said "Mr. Japanwalla, I am not at all interested in any other polish maker, nobody is interested, when we know you have suffered the loss. I tell you that we have all discussed and decided that the present agreement stands good for fifty years and every ten years we shall renew with a letter, provided you forget about your claim of fifty thousand rupees and maintain the same top quality of all Esso polishes always; and to keep you secured, you pay us our royalty every ten years, as we have full trust in you and, therefore, we have given you Esso polishes for making for fifty years. You too should have the same trust in us and stop writing registered letters. I have made all facts very clear to you". I thanked him and came away and sent a letter addressed to him incorporating what had transpired at the meeting including what he had told me."

13. A copy of the letter was also sent by the complainant to general manager, accused No. 5. The complainant thereafter continued manufacturing and marketing Esso polishes in pursuance of the assured 50 year" agreement till April 3, 1968. On April 24, 1967, accused No. 3, Gupta, on behalf of the applicant-company placed on order for 1,500 gross Esso polishes to sell to about 2,500 dealers in the course of "Esso Polish campaign" which he had said they would start after the monsoon in October, 1967, and the complainant agreed to allow a special discount of 25 per cent. as against the usual discount of 20 per cent. to buyers of one gross and above with free enamel plate. The complainant also to give 200 dozen polishes free to the dealers suggested by the company for free polishing of customer's cars on Esso pumps. The complaint made preparation for the entire goods but the campaign did not start. On January 4, 1968, the complainant wrote a letter informing them how a large amount had been blocked in the goods and requested the company to start the campaign. In December, 1967, when the complainant had gone to the applicant-company and met accused No. 3, he wanted the original agreement made with the complainant dated February 7, 1963, for sanction of the campaign .The complainant gave a copy of the agreement as the original was not traceable. The officer insisted on having the original agreement. On January 4, 1968, the complainant informed accused No. 3 that the original agreement was misplaced.

14. Soon thereafter by their letter dated April 3, 1968, the accused informed the complainant that there agreement was for one year renewable at their option and as the agreement was not renewed "it stands terminated". They also asked the complainant to hand over to them all the empty tins. This made the complainant to send a claim of Rs. 7,56,840 of the value of the ordered goods in filled tins and of all the empty tins by a letter dated May 27, 1968. On June 12, 1968, the solicitors of the company denied the liability of the company. In January, 1971, the complainant found his Esso file in which he found the true copy of the agreement certified by Honorary Presidency Magistrate. Relying on this, the complainant sent notice through his solicitors dated February 23, 1971, to the accused-company demanding Rs. 22,56,840 for cost of the filled and empty tins and damages for the unexpired period of 50 years. The company filed complaint against the complainant and others under sections 78 and 79 of the Trade and Merchandise Act alleging that the agreement had expired after one year and that the complainant had manufactured and expired after one year and that the complainant had manufactured and marked goods after the expiry of the agreement which is pending before the Presidency Magistrate, 28th Court, and the hearing of which is stayed on an application made by the applicant-company sine die.

15. The complainant further alleged that he realised by this time that the accused had all the time been playing a game. The complainant, therefore, alleged that they had a dishonest intention from the very inception and had cheated him by dishonestly inducing him to withdraw his claim of R. 50,000 for the cost of the stock remaining unsold at the time of the change of name of the

company by falsely assuring him that the agreement though at first for one year was automatically renewable every year for 50 years and further strengthening this false assurance by referring to his letter of June 27, 1962, which they had not denied or repudiated.

16. The complaint in this case, was, therefore, filed with contents as aforesaid alleging as follows :

"That their intention was dishonest from the beginning is clear from the fact that in their complaint they have stated that the agreement expired after the first year because it was not renewed. I have evidence in the shape of correspondence to show that even after the expiry of one year and in fact right up to the date of termination, i.e., April 3, 1968, they had knowledge that I was manufacturing and marketing their goods. They evidently waited for my claim to be time-barred before revealing their dishonesty by writing the letter of termination. The timing of the letter of termination was the result of their discovery that I had misplaced my original agreement and, therefore, was helpless in the matter of taking any action against them.

All the accused have in committing this offence of cheating me acted in furtherance of common intention of each other and have aided and abetted each other. I, therefore, charge them u/s 417 and 420 read with sections 34, 109 and 114 of the Indian Penal Code and I request that this honourable court may proceed against them according to law for the offence committed by them."

17. It is manifest that but for the averments that the claim of the complainant was time-barred and process should be issued against the accused the complaint sounds almost like a plaint in civil suit. As far as we can see, what is alleged is nothing more than a breach of an assurance or undertaking or representation made by accused Nos. 2,3, and 4 to the complainant that even though the agreement was not an agreement for 50 years as it was automatically renewable every year it mounted to an automatic agreement renewable for 50 years and, hence, when they wrote on April, 3, 1968, that the agreement was terminated, the said accused Nos. 2, 3 and 4 and the company committed breach of the agreement to renew the agreement for 50 years. Merely stating in the complaint that the termination showed that the parties were "dishonest" from the beginning cannot convert a purely civil dispute like the present one into a crime.

18. A civil proceeding has for its object the recovery of money or other property, or the enforcement of a right for the advantage of the person suing, while criminal proceeding has for its object the punishment of a public offence. Criminal proceedings cannot be used as a means of recovering a civil debt in the absence of express provision to that effect. (See Halsbury's Laws of England, Volume X, para. 502, page 271, and R. v. Peel). The allegations made in the complaint are not at all sufficient to attract the application section 417 and 420 read with sections 34, 109 and 114 of the Indian Penal Code. The complainant himself and signed the agreement which was an agreement renewable every

year. Merely because he signed it believing the assurances of the officers that if he did not commit breach of the agreement the agreement would be renewed, it could not make the conduct of accused Nos. 2 to 4 dishonest in any manner. The complainant is a business man. He has signed the agreement with open eyes. It was clear that the agreement was renewable every year. It could not be so renewed without the consent of both the parties. In the face of the written agreement it is not open to the complainant to allege dishonest intention against the officers of the company. In these circumstances it is doubtful whether even a civil claim could be made by the complainant against the accused. By mere reproduction of the words "dishonestly" or "intention to cheat" a party cannot convert a purely civil dispute into a crime.

19. Cheating is defined in section 415 of the Indian Penal Code. The section requires :

"1. Deception of any person.

2. (a) Fraudulently or dishonestly inducing that person -

(i) to deliver any property to any person; or (ii) to consent that any person shall retain any property, or

(b) intentionally inducing that person to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property."

20. The allegations made in the complaint are not sufficient to show deception of the complainant. He cannot say that he was deceived when he signed the agreement because the officers assured him that if he did not commit breach of the agreement the agreement would be renewed. He did not give up this claim under any deception. He gave it up because he wanted a further agreement as admitted in the complaint itself.

21. Distinction between mere breach of contract and cheating depends upon the intention of the accused at the time of the alleged inducement which may be judged by his subsequent act of which the subsequent act is not the sole criteria. The complainant has inferred a dishonest intention on the part of the officers by their subsequent declaration that the agreement was already terminated as one year had expired. This inference is not open to him because on his own allegations he had signed the agreement renewable every year believing that it was renewable for a period of 50 years. He need not have signed the agreement. He has said in the complaint itself that the legal department of the applicant-company had said that the officers could not put in 50 years in the agreement. Hence it is clear that the complainant knew that the officers could not assure him at all that the agreement was renewable for 50 years. The allegations made in the complaint itself disclose only at the highest a mere breach of the contract which cannot give rise to a criminal proceeding against any of the accused. The ends of justice, therefore, require the proceedings to be quashed to prevent

waste of time of the criminal court and multiplicity of proceedings and consequent harassment to the accused.

22. Although this would have been enough to quash the proceedings and dispose of this matter, it is further necessary to deal with the contention of Mr. Jethmalani that the applicant-company and its officers could not be indicted u/s 417 or section 420 of the Indian Penal Code having regard to the nature of the company which is incorporated in the United States of America with its memorandum of association and articles of association band also having regard to the necessity for proof of mens area which is an essential element under sections 417 and 420 of the Indian Penal Code. The law in England on this point is succinctly summarized in Boyle and Sykes" Gore-Browne on Companies, new edition, 1972, at pages 9 and 10, as follows :

"..... Since a company, or any other corporate body, is a legal abstraction without a real mind of its own, the courts at one time were unwilling to convict a company of an offence involving proof of mental state whether of intention, malice or dishonesty. At this period it was only possible to charge a company with criminal offences of strict liability. In a number of cases the courts were prepared to allow a company to be prosecuted for offences committed by its employees where the statutes creating the offence could properly be construed as imposing vicarious liability upon the company as employer."

23. In order to hold a company liable for crimes involving proof of mens area the courts have had to develop a new principle of corporate liability which is sometimes referred to as the alter ego doctrine. This allows the law to attribute the mental state of those who in fact control and determine the management to the company itself as being its "directing mind and will." The criminal intentions of a company's ordinary servants and agents will not suffice for the purpose, since the company is not being called to answer simply on the principle of respondent superior.

24. The question of whether the mental state of the directors or other officers, collectively or individually, can be attributed to the company as its own act must "depend on the nature of the charge, the relative position of the officer or agent and other relevant facts and circumstances of the case". This test applies both as to how the jury should satisfy themselves that mens area on the part of the company has been proved. On this basis companies have been convicted of crime involving dishonesty whether created by statute or by common law.

25. The court will investigate as a question of fact how the management of the company has in reality been conducted so as to determine who is the responsible officer in the area of activity in which the offence occurred. The "directing mind and will" of the company need not, in an appropriate case, be in the exalted position of the board of directors or the managing director. Thus, in Moore v. I. Bresler Ltd., a company was convicted of an offence requiring proof of an intention to deceive where those responsible were its secretary and branch

manager.

26. Mr. Jethmalani also relied on the comment made by Professor Glanville Williams in *Criminal Law*, 2nd edition, 1961, at page 858, in foot-note 5, with reference to a decision in *Moore v. I. Bresler Ltd.* and an article by Welsh in 62 L.Q.R. at pages 359-60 suggesting that the decision went too far. According to Professor Glanville Williams the decision in *Moore v. I. Bresler Ltd.* had gone too far in holding that the acts of the sales manager or the branch manager amounted to acts of the company.

27. The question has been considered thoroughly in *Tesco Supermarkets Ltd. v. Nattrass*. Though it was a case under the English Trade Descriptions Act, 1968, the House of Lords discussed the question of criminal liability of a company and it will be useful to quote here the relevant observations. Lord Reid stated :

"Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation he can act as the company. It may not always be easy to draw the line but there are cases in which the line must be drawn."

Lord Morris of Borth-y-Gest stated :

"In general criminal liability only results from personal fault. We do not punish people in criminal courts for the misdeeds of others. The principle of respondent superior is applicable in our civil courts but not generally in our criminal courts."

Viscount Dilhorne stated :

"In the course of the argument a great many cases were cited with regard to the criminal liability of a company. A company can only act through individuals and it is well-established that a company can be criminally liable even if the offence involves proof of an intent. *Mousell Brothers v. London and North-Western Railway Co.* and *Director of Public Prosecutions v. Kent and Sussex Contractors Ltd.*"

Lord Pearson stated :

"A company may have an alter ego, if those persons who are or have its ego delegate to some other person the control and management, with full discretionary powers, of some section of the company's business. In the case of a company, it may be difficult, and in most cases for practical purposes unnecessary, to draw the distinction between its ego and its alter ego, but theoretically there is that distinction."

28. Mr. Clement, being the manager of one of the company's several hundreds of shops, could not be identified with the company's ego nor was he an alter ego of the company. He was an employee in a relatively sub-ordinate post. In the company's hierarchy there were a branch inspector and an area controller and a regional director interposed between him and the board of directors."

29. Lord Diplock, with respect, made the most valuable observations which run as follows :

"In my view, therefore, the question : what natural persons are to be treated in law as being the company for the purpose of acts done in the course of its business, including the taking of precautions and the exercise of due diligence to avoid the commission of a criminal offence, is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company.

This test is in conformity with the classic statement of Viscount Haldane L.C. in *Lennard's Carrying Company Ltd. v. Asiatic Petroleum Company Ltd.*"

He further stated :

"My Lords, there may be criminal statutes which upon their true construction ascribe to a corporation criminal responsibility for the acts of servants and agents who would be excluded by the test that I have stated to be appropriate in determining whether a corporation has itself committed a criminal offence."

30. The passage of Viscount Haldane, Lord Chancellor, in *Lennard's Carrying Company Ltd. v. Asiatic Petroleum Company Ltd.*, referred to by Lord Diplock, is as follows :

"My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company."

31. In view of these principles it was submitted by Mr. Jethmalani that although *L. M. Paranjpe J.* was right in holding in *State of Maharashtra v. Syndicate Transport Co.* that a company cannot be indictable for offences which can only be committed by a human individual, like treason, murder, bigamy, perjury, rape, etc., or for offences punishable with imprisonment or corporal punishment, the propositions made at page 200 by *L. M. Paranjpe J.* that :

"..... a corporate body ought to be indictable for criminal acts or omissions of its directors, or authorised agents or servants, whether they involve mens rea or not, provided they have acted or have purported to act under authority of the corporate body or in pursuance of the aims or objects of the corporate body and that the question whether a corporate body should or should not be liable for criminal action resulting from the acts of some individual must depend on the nature of the offence disclosed by the allegations in the complaint or in the charge-sheet, the relative position of the officer or agent, vis-a-vis, the corporate body and the other relevant facts and circumstances which could show that the corporate body, as such, meant or intended to commit that act." and further that each case will have necessarily to depend on its own facts, must be considered as propositions which ignore the constitution of corporate bodies under the memorandum of association and articles of association. This criticism appears to us to be justified having regard to what Lord Diplock has stated in his speech but the remarks of L. M. Paranjpe J. were obiter as the case was decided in the context of the question of liability of a company u/s 420 of the Indian Penal Code alone and it was rightly held by L. M. Paranjpe J. that as section 420, Indian Penal Code, made it necessary for the court to inflict imprisonment, a company could not be indicted under that section.

32. Perhaps the true view appears to be what Lord Reid has stated :

"I think that the true view is that the judge must direct the jury that if they find certain facts proved then as a matter of law they must find that the criminal act of the officer, servant or agent including his state of mind, intention, knowledge or belief is the act of the company."

33. But it must be proved as a matter of fact that the officers were acting within the limits of their authority on behalf of the company.

34. Applying this test to the present case we feel no hesitation in holding that the complaint was drafted without any regard to these principles. There is not a word to suggest anywhere in the complaint that the officers-accused Nos. 2 to 5 - had done any act on behalf of the company so as to make such act in law the act of the company. On the contrary the averments made in the complaint this, in our judgment, is nothing but confused thinking on the matter. The law attributes to the company intention of the officers of the company under certain circumstances. The company's intention could be ascertained only when the company in a general body or at the meeting of the board of directors or in accordance with the memorandum of association or articles of association has expressed that intention in the form in which it should be expressed. In the absence of any such averments it is clear that the complaint against the applicant-company is clearly not maintainable in law having regard to the general principles of criminal liability enunciated by the House of Lords in the above case.

35. Mr. Jethmalani, in our opinion, is also right in his contention that as the substance of the complaint is with respect to the loss sustained by the

complainant in giving up his claim against the Esso Co., although section 417, Indian Penal Code, is referred to in the complaint and in the process issued by the learned Magistrate the only section which could be, if at all, invoked by the complainant on the basis of his allegations was section 420, Indian Penal Code, and not section 417, Indian Penal Code, and hence the ratio of L. M. Paranjpe J.'s judgment in *State of Maharashtra v. Syndicate Transport Co.* would also apply and no indictment could be made against the company u/s 420, Indian Penal Code. If no indictment could be made against the company the allegations of the complainant that the accused had common intention with the company also will fall to the ground and the complaint must be dismissed against all the accused.

36. Mr. Paranjpe, learned counsel for the complainant, fairly stated that he could not submit that this court had no jurisdiction u/s 561-A read with section 439 of the Criminal Procedure Code to quash the proceedings against all the accused on an application filed by the applicant-company if this court found, as it has found, that the allegations made in the complaint did not constitute any offence and the complaint was not maintainable as it involves a civil dispute. It is, therefore, unnecessary for us to discuss the question any further.

37. Mr. Jethmalani submitted that as the present complaint was filed on the same allegations on the basis of which the earlier complaint was filed and withdrawn, it was clear that the complainant's motive in filing this complaint was not to vindicate the law but to coerce the accused by criminal process to enter into a settlement with regard to his false claim. He, therefore, submitted that this was a case in which compensation should be ordered u/s 516-AA of the Criminal Procedure Code. There is undoubtedly some force in what Mr. Jethmalani has stated, but it is clear that there is a dispute as found by us above. In view of that dispute it is possible that the complainant was advised to file a complaint and it cannot be said that it is without any reasonable or proper cause.

38. For the above reasons, we allow the application and quash all the proceedings against the applicant and all the other accused pending in the court of the learned Presidency Magistrate, 28th Court, in Case No. 18/S of 1972. All the accused are discharged.

39. Application allowed.