2026 INSC 956

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 4250 OF 2026

(Arising out of Special Leave Petition (Criminal) No. 3597 of 2019)

SANOFI INDIA LTD. **…APPELLANT**

VERSUS

CENTRAL BUREAU OF INVESTIGATION **…RESPONDENT**

J U D G M E N T

J.B. PARDIWALA, J.

For the convenience of exposition, this judgment is divided into the following parts:

A. FACTUAL MATRIX ____ 3

B. SUBMISSIONS OF THE PARTIES ____ 5

I. Submissions on behalf of the Appellant ____ 5

II. Submission on behalf of the Respondent ____ 7

C. ISSUE FOR CONSIDERATION ____ 7

D. ANALYSIS ____ 7

I. Introduction to corporate criminal liability ____ 8

II. Corporate criminal liability and the attribution question: position in England and Wales ____ 12

(a) Tesco Supermarkets Ltd. v. Nattrass ____ 16

(b) Meridian Global Funds Management Asia Ltd v. Securities Commission ____ 28

(c) The Barclays Cases ____ 36

(i) Meridian Principles ____ 37

(ii) Test for Determining Attribution ____ 39

(iii) Application to facts ____ 43

(iv) Aspects of Divergence ____ 47

(d) Developments in law post Barclays ____ 49

(e) Summary ____ 53

III. Corporate criminal liability and the attribution question: position in India **57**
(a) Issue of Mandatory Imprisonment 58
(b) Issue of Mens Rea 62
(c) How do corporates possess mens rea under Indian Law 71
(i) Attribution Framework 73
(ii) Necessary clarifications 78
(iii) Observations on the framework 81
(d) Summary 83
IV. Whether Proceedings Can Be Quashed on the Sole Ground of Non-identification and Non-Arraignment **87**
(a) The Identification aspect 89
(b) The Arraignment aspect 92
(c) Whether the allegations make out an offence? 96
E. CONCLUSION **98**

1. Leave granted.

2. This Appeal arises from the judgment and order passed by the High Court of Karnataka dated 15.02.2019 in the Criminal Petition No. 4280/2018 filed by the Appellant herein (accused no.2 in the chargesheet), by which the High Court dismissed the petition and declined to quash the criminal proceedings in Special C.C.No. 226/2017 before the XLVI Additional City Civil and Sessions Judge and Special Judge for CBI Cases, Bengaluru City.

A. <u>FACTUAL MATRIX</u>

3. The Appellant is a public limited company engaged in the primary business of manufacturing pharmaceutical products. The Appellant, pursuant to tender processes, supplied pharmaceutical products for the Rare Materials Project, Bhabha Atomic Research Centre ("**BARC**") in the years 2011-12, 2013-14 and 2015-16.

4. The Appellant was arrayed as Accused No. 4 in FIR No. RC.17(A)/2015, wherein it was alleged that Dr. P. Anand, Scientific Officer (Medical) at BARC, had conspired with various pharmaceutical companies to procure medicines at inflated rates and in quantities exceeding the requirements. After investigation, the chargesheet was filed in 2017 against Dr. P. Anand (accused no.1) and Appellant (accused no.2), alleging commission of offences punishable under Section 120B r/w Section 420 of the Indian Penal Code ("**IPC**") and Sections 11,12,13(2) r/w 13(1)(b) and (d) of the Prevention of Corruption Act,1988 ("**PC Act**"). No employee or official of the Appellant has been arraigned as an accused in the chargesheet.

5. The prosecution's case against the Appellant as set out in the final report/chargesheet is as follows:

    a. During the years 2011-12, 2013-14, and 2014-15, respectively, Dr. P. Anand, a public servant, entered into a criminal conspiracy with the Appellant in relation to the purchase of medicines and drugs for the Rare Materials Project, BARC. The prosecution's case is that

Dr. Anand, across these purchases, either (i) misclassified items as proprietary to justify their procurement from the Appellant despite there being lower bids from other companies, or (ii) omitted competing bidders from the tender process, or (iii) declined to place orders with the lowest bidder once quotations were received. This conspiracy caused a wrongful loss to BARC amounting to INR 3,53,361/-, and a corresponding wrongful gain to the accused themselves, thereby constituting an offence under Section 120B r/w Section 420 of the IPC.

b. Further, Dr. P. Anand received an illegal gratification of INR 42,750/- from the Appellant, without consideration, under various pretexts, thereby committing the offence under Section 11 of the PC Act. The Appellant abetted in the commission of this offence.

6. Based on the chargesheet, the Trial Court took cognizance of the offences and issued process against the Appellant and Dr. P. Anand. The Appellant thereafter filed a petition before the High Court of Karnataka, seeking to quash the criminal proceedings against it, including the order taking cognizance. The principal argument advanced on behalf of the Appellant was that for the offence of criminal conspiracy, a corporate entity cannot be prosecuted independently of the natural persons who acted on its behalf, as only through such persons can a company be said to enter into a criminal conspiracy at all. In the present case, since the Appellant had been arraigned as an accused without any of its employees or officials being arraigned alongside it, the prosecution against it could not be sustained.

7. The High Court of Karnataka, in the impugned judgment, framed the following issues for its consideration:

> *"(i)Whether prosecution is maintainable only against a corporate entity without its directors or person in charge of the affairs being arraigned as an accused?*

(ii)Whether criminal proceedings in the instant case are liable to be quashed?"

8. The High Court, relying on the decision of this Court in ***Iridium India Telecom Ltd. v. Motorola Inc.***, reported in **(2011) 1 SCC 74**, concluded that (i) companies can be held liable under criminal law, not just for strict liability offences, but even for offences that require *mens rea* and (ii) a complainant is entitled to an opportunity to prove the averments made in the complaint. Answering the question before it, it held that a criminal prosecution against a corporate entity, without its directors or persons in charge of its affairs being arraigned, is maintainable. Further, the High Court observed that, given the specific allegation that the Appellant had been favoured despite not being the lowest bidder, a trial was necessary, since the chargesheet contained details of quotations given by other companies, which could be proved only at trial. Accordingly, the petition was dismissed.

9. In such circumstances referred to above, the Appellant is before this Court with the present appeal.

B. SUBMISSIONS OF THE PARTIES

I. SUBMISSIONS ON BEHALF OF THE APPELLANT

10. Mr. Siddharth Luthra, the learned senior advocate appearing for the Appellant, made the following submissions :

a. The question here is whether, in cases where the offence charged requires proof of *mens rea*, prosecution of the alter ego or the governing mind of the corporate entity is essential to prosecute the company itself.

b. The '*identification principle*' prescribes that the conduct and state of mind of a corporation's key personnel is attributable to the corporation and such persons are said to represent the directing mind of the corporation. The House of Lords in ***Tesco Supermarkets Ltd. v. Nattrass***, reported in **[1972] A.C. 153**, held that a corporate body is deemed to act and to acquire knowledge only through those individuals who can be identified as the "directing mind and will of the corporation". The Crown Prosecution Guidelines also prescribe applying the 'identification principle' for ascertaining criminal liability of corporations for offences requiring *mens rea*.

c. Further, various rulings of this Court also establish the principle that, for offences which require proof of *mens rea*, it is a corporation's alter ego, or governing mind, whose act and state of mind must be identified and attributed to the company. Absent the identification and arraignment of such a person, a prosecution against the company cannot be sustained.

d. In the present case, the Respondent has failed to identify and arraign any alter ego or directing mind whose *mens rea* can be attributed to the Appellant. Consequently, there is no basis to attribute to the Appellant either: (a) the commission of an offence involving *mens rea* or (b) the commission of some overt act which demonstrates the existence of conspiracy. Consequently, the Appellant cannot and ought not to have been prosecuted.

e. The High Court, in holding that the prosecution against a corporate entity is maintainable without its directors or persons in charge of its affairs being arraigned, had completely bypassed the identification principle and omitted to see that there had to be material against specific individuals who were the governing mind or the alter ego of the company, before liability could be imputed to the company itself.

11. In the circumstances referred to above, the learned counsel prayed that, there being merit in his appeal, it be allowed.

II. SUBMISSION ON BEHALF OF THE RESPONDENT

12. The Respondent, through their counter affidavit, submitted as follows:

    a. The decisions of this Court in ***Iridium India*** (*supra*) and ***Standard Chartered Bank v. Directorate of Enforcement***, reported in **(2005) 4 SCC 530**, allow for the prosecution of the Appellant even without identifying or arraigning any of its employees individually.

    b. There is sufficient oral and documentary evidence which *prima facie* proves that the Appellant received undue favours from accused no.1 fraudulently and in reciprocity, the Appellant paid a bribe to him. The evidence on record clearly establishes that there existed a conspiracy between the Appellant and accused no.1.

13. In the circumstances referred to above, the Respondent prayed that, there being no merit in the appeal, it be dismissed.

C. ISSUE FOR CONSIDERATION

14. Having heard the learned counsel for the parties and having gone through the materials on record, the following question falls for our consideration:

    a. Whether the High Court ought to have quashed the criminal proceedings instituted against the Appellant company on the ground that no natural person had been identified and arraigned alongside it?

D. ANALYSIS

15. At first blush, the question framed above may appear to be a simple one. On closer examination, it proves to be a good deal more complex, and its resolution requires us to work through several preliminary questions in turn. Foremost among these is how corporate criminal liability is envisaged, i.e., whether, and in what manner, a corporation may be conceived as capable of committing a crime. It is with this foundational question that we begin.

I. INTRODUCTION TO CORPORATE CRIMINAL LIABILITY

16. Corporate criminal liability is a notoriously vexed issue, and the difficulty traces back to two fundamental notions we simultaneously hold about corporations. First, a corporation is an artificial person with an identity distinct from that of its members. Second, a corporation is merely an abstraction, i.e., an impalpable thing or, as is famously said, a corporation has "*no soul to damn and no body to kick*".[1]

17. Generally, there are two constituent elements in a crime: (a) the offending act or conduct called the "*actus reus*" and (b) the mental element of guilty mind, called the "*mens rea*". In other words, the blameworthy act which is backed by a guilty mind constitutes a crime. Criminal law thus focuses on an individualistic model of responsibility, i.e., it looks to the accused's own act and own mind. Herein lies the difficulty for a corporation. Precisely because a corporation is a *separate* legal entity, criminal law would require the corporation itself to supply this act and this guilty mind. Yet, being an abstraction, the corporation appears incapable of possessing either.[2] Common sense would therefore dictate that a corporation should fall outside the realm of criminal liability altogether.

18. This is one of the central arguments that jurists opposed to the concept of corporate criminal liability rely upon.[3] They argue that if a corporation is incapable of acting on its own and must necessarily act through its human instrumentalities, what is the point in holding it guilty of an offence? In real terms, the liability is that of the individuals who are responsible for the corporate offence, and it is they who should be targeted by law.

---

[1] Stevens J. in ***Citizens United v Federal Election Commission,*** 130 S.Ct. 876 (2010) captured the same duality in the American constitutional context: *Corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their 'personhood' often serves as a useful legal fiction. But they are not themselves members of 'We the People' by whom and for whom our Constitution was established.*

[2] Mark Pieth & Radha Ivory, *Emergence and Convergence: Corporate Criminal Liability Principles in Overview*, in *Corporate Criminal Liability: Emergence, Convergence, and Risk* 3, 4–5 (Mark Pieth & Radha Ivory eds., 2011).

[3] Pradip Ghosh, *Criminal Liability of Corporate Entities: With Special Reference to the Law in India* 21–24 (2017).

Further, scholars belonging to this school of thought have also contended that corporate civil liability can achieve the same outcomes as that of corporate criminal liability, while largely avoiding its undesirable features, thereby obviating the need for corporate criminal liability.[4]

19. Jurists in favour of corporate criminal liability, on the other hand, prefer to focus on the social realities of the contemporary world.[5] They argue that while corporations may have a fictional personality in law, in the modern world they are very much real, and it would be naïve to ignore the potential they have to cause substantial harm. They also argue that it is not always easy to identify and secure the punishment of individuals hiding behind the corporate façade.

20. While the academic debate goes on, it is beyond question that, both in India and elsewhere, corporations can and are being subjected to criminal liability (as will be discussed more thoroughly in the later parts of this judgment). This has been primarily driven by the pragmatic recognition that corporations, as institutions commanding vast financial and socio-political power, possess the ability to cause serious harm. Another aspect which has contributed to the growing recognition of corporate criminal liability is the burgeoning anxiety that recognising the corporation as a legal person has conferred protections without imposing corresponding responsibilities.

21. If there is an acceptance of the fact that corporations can be held criminally liable, the very next question is: how can we do so? How can we hold an abstract entity liable for something which requires not only an act but also a state of mind? Since a corporation acts through the medium of natural persons, criminal liability can be established by attributing the acts and mental states of such natural persons to the corporation itself. This, in

---

[4] Vikramaditya S. Khanna, *Is the Notion of Corporate Fault a Faulty Notion?: The Case of Corporate Mens Rea*, 79 B.U. L. Rev. 355 (1999); Vikramaditya S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 Harv. L. Rev. 1477 (1996).
[5] *Supra note* 3 at 21-40.

essence, is an exercise in moulding corporate liability to fit into existing notions of criminal jurisprudence.[6]

22. This process of attribution is the legal reasoning by which the conduct, or the state of mind, of a natural person is treated, in law, as the conduct or state of mind of the corporation itself. Through this process, the acts and the mind of a human being become the acts and the mind of a corporation, for the purpose of fixing it with legal liability, whether civil or criminal.[7]

23. Attributing acts of natural persons to a corporation, standing alone, was a relatively less controversial exercise. Consequently, corporate criminal liability first took root in relation to offences which did not require proof of *mens rea*. Attributing the state of mind of a natural person to a corporation has proved a good deal more contentious. This may be envisaged as a two-fold question. First, whether a corporation can be said to possess *mens rea*, and accordingly be held criminally liable for offences which require proof of *mens rea* ("**first question**"). Secondly, and only once the first is answered in the affirmative, on what basis can a corporation be said to possess such *mens rea* ("**second question**"). This inquiry invariably becomes a question of attribution, namely, what is the basis on which the *mens rea* of a natural person is to be attributed to the corporation. Once answered, this inquiry itself yields the answers to further questions such as: (i) what is the kind of liability that such attribution imposes on the corporation, and (ii) whose state of mind is to be attributed to the corporation and in what circumstances.

24. The answer to the first and second questions determines the scope and contours of corporate criminal liability in a particular jurisdiction. In India, as the discussion later will indicate more clearly, there is no disagreement that the first question has been answered in the affirmative, i.e., corporations can possess *mens rea*, and thereby accordingly be held liable

[6] T.K. Bhaskar & V. Umakanth, *Corporate Criminality and Law*, 38 J. Indian L. Inst. 218, 220 (1996).
[7] ***Moulin Global Eyecare Trading Ltd. (In Liquidation) v. Commissioner of Inland Revenue***, (2014) 17 HKCFAR 218.

for offences which require such proof. There has, however, been little to no discussion on the second question.[8]

25. It would be trite to observe that the question before us in the present case does not press upon the first question. The impugned judgment and the submissions canvassed before us both proceed on the understanding that corporations can possess *mens rea*. However, consideration of the issue before us requires us to venture into, and at least broadly understand, the position under Indian law regarding the second question. This is because whether non-identification and non-arraignment render a prosecution not maintainable cannot be answered without first understanding, in broad terms, how attribution operates. This understanding will anchor our answer to the issue before us.

26. To guide us in this pursuit, we turn to the English law. We do so because Indian law offers little to no independent discussion of the second question. English law, whose broad framework most closely resembles the one within which corporate criminal liability must operate in India, offers the most useful starting point. For this reason, the discussion of English law that follows is detailed. It examines not only the ratio of each decision, but also, where relevant, the underlying principles and their application to the facts. This detail is necessary because the framework we ultimately adopt draws on that reasoning and factual application, and not merely on the conclusions English law has reached.

27. Accordingly, we shall first trace the development of corporate criminal liability in England, with particular focus on how English law has sought to answer the second question. Thereafter, the discussion moves to India, where we briefly examine the developments that have occurred on corporate criminal liability thus far, before turning to how the second question may be answered under Indian law. Finally, equipped with an

---

[8] *See* Umakanth Varottil & Mihir Naniwadekar, *Corporate Criminal Liability and Securities Offerings: Rationalizing the Iridium-Motorola Case*, 28 Nat'l L. Sch. India Rev. 144 (2013).

understanding of how attribution operates under Indian law, we turn to the question before us in this appeal.

II. <u>*CORPORATE CRIMINAL LIABILITY AND THE ATTRIBUTION QUESTION: POSITION IN ENGLAND AND WALES*</u>

28. Early English common law did not envisage any criminal liability for a corporation. As Blackstone observed in the second half of the eighteenth century, a corporation could not commit treason, felony, or any other crime in its corporate capacity, though its members might do so in their distinct, individual capacities.[9] This position has since undergone a gradual development over a significant period of time.

29. The earliest signs of corporate criminal liability under English law appear in cases of public nuisance arising from nonfeasance. Corporations were held liable where they failed to perform duties imposed on them by charter, prescription, or statute. This was because it was recognised that a corporation could be said to have failed to do something as much as an individual. However, it was questionable whether corporations could be held criminally liable for misfeasance (positive act) rather than nonfeasance (omission).

30. ***Regina vs Great North of England Railway Company***, reported in **(1846) 9 QB 315**, concerned an instance wherein the workmen employed by the defendant company unlawfully cut a trench through the highway and caused great damage to the general public. For the defendant company, it was argued that no indictment for misfeasance could lie against a corporation. Lord Denman CJ roundly dismissed that submission and went on to state:

> *"The law is often entangled in technical embarrassments; but there is none here. <u>It is as easy to charge one person, or a body corporate, with erecting a bar across a public road as with the non-repair of it; and they may as well be compelled to pay a fine for the act or for the omission</u>."*

[9] *Supra note* 3 at 41; L.H. Leigh, *The Criminal Liability of Corporations in English Law* 15 (1969).

[Emphasis supplied]

Thus, the Court refused to draw a technical distinction between non-feasance and misfeasance and held that a corporation could be held equally liable for positive acts as it was for omissions. It appears that the courts imposed liability on corporations in such cases because the corporation itself owed the duty. Thereby, a failure to discharge that duty, whether through omission or through a positive act, was accordingly treated as a failure of the corporation itself.

31. By 1850, a corporation could accordingly be indicted for public nuisance and for failure to perform a public duty imposed on it by statute. This period also saw a marked increase in regulatory statutes directed at corporations, leading in turn to a growing number of corporate convictions. The early development of corporate criminal liability under English Law was thus driven largely by this regulatory regime, which imposed duties on corporations operating in areas of public interest. Around the same time, vicarious liability opened up another avenue for attributing acts to a corporation. This was used primarily to hold corporations liable for strict or absolute liability offences.

32. Broadly speaking, corporate criminal liability had, up to this point, developed along narrow lines and was confined largely to situations where no proof of *mens rea* was required. Vicarious liability could not be used for those offences requiring *mens rea*, for it was a settled principle of English law that vicarious liability had no general application in the criminal sphere, i.e., the doctrine did not ascribe to a principal the state of mind of his agent. In short, where only the attribution of acts was required, the law had an answer, but where attribution of both act and mind was required, it did not. One plausible reason behind this might have been that while it may make sense to talk of corporate bodies causing something to happen or failing to do something, it is less natural to talk about companies as holders of mental states. A new doctrinal basis was therefore required

to attribute to a corporation the state of mind of the natural persons acting for it.

33. It is often said that the three cases decided in 1944[10] were the first to conclusively establish that a corporation could be held liable for offences involving a *mens rea* element. These cases, however, do not warrant detailed discussion here. While their end point was that a corporation could indeed be held liable for such offences, the result, as one scholar observed, was confusion rather than clarity.[11] The courts in these cases failed to articulate any clear or principled basis for how such liability was to be established. This came only in 1971, with the House of Lords decision in ***Tesco Supermarkets*** (*supra*). However, before discussing ***Tesco Supermarkets*** (*supra*), it is necessary to consider the House of Lords decision in ***Lennard's Carrying Company v. Asiatic Petroleum Company***, reported in **[1915] A.C. 705**. Not only was this decision relied upon by the House of Lords in ***Tesco Supermarkets*** (*supra*), but it also provided the foundation upon which courts have since sought to answer the question of whose act or state of mind is to be attributed to a corporation.

34. ***Lennard's Carrying*** (*supra*) arose from a cargo claim. The ship carrying the cargo had sunk after her boiler caught fire, and the claim followed from the resulting loss of cargo. It was found that the boiler was defective, rendering the ship unseaworthy. The claim was sought to be resisted by the company by contending that under the English Merchant Shipping Act, 1894, the owner was not liable unless there was actual fault or privity on his part. The House of Lords held that there were known defects in the ship's boiler and that Mr Lennard, a director of the company who had been managing the affairs of the ship, did know or should have known about the said defects in the boiler. The issue was whether the fault of the appropriate organ, such as the board of directors or managing director, could be attributed to the company. Dismissing the appeal and holding

[10] ***D.P.P. v. Kent and Sussex Contractors***, [1944] KB 146; ***Rex v. I.C.R. Haulage Ltd***, [1944] KB 551; ***Moore v. I. Bresler Ltd.***, [1944] 2 All ER 515.
[11] L.H Leigh, *Supra note* 9 at 31.

the company liable, Viscount Haldane made the following pertinent observations:

> *"Now, my Lords, did what happened take place without the actual fault or privity of the owners of the ship who were the appellants? <u>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.</u> 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. <u>My Lords, whatever is not known about Mr. Lennard's position, this is known for certain, Mr. Lennard took the active part in the management of this ship on behalf of the owners, and Mr. Lennard, as I have said, was registered as the person designated for this purpose in the ship's register</u>. [...] <u>For if Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself within the meaning of s. 502. It has not been contended at the Bar, and it could not have been successfully contended, that s. 502 is so worded as to exempt a corporation altogether which happens to be the owner of a ship, merely because it happens to be a corporation. It must be upon the true construction of that section in such a case as the present one that the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself.</u> [...]"*

[Emphasis Supplied]

35. From the above extract, three things become abundantly clear:

    a. *First*, a company, being an abstraction, has no mind or body of its own; consequently, its active and directing will must be sought in a person, who is the very ego and centre of the personality of the corporation and may be referred to as its "directing mind and will".

b. *Secondly*, the action of the person recognised as the directing mind and will of the company is considered to be the action of the company itself.

c. *Thirdly*, such a person is not to be treated as a mere servant or agent, for whose actions the company would be liable only on the footing of *respondeat superior*; rather, the company is liable because his action is, in law, the very action of the company itself, i.e. direct liability.

Applying these principles to the facts before him, Viscount Haldane found that Mr. Lennard, who took an active part in managing the ship on the owners' behalf, and who was registered as the person designated for this purpose in the ship's register, was the directing mind and will of the company for the purposes of Section 502. His actions were, therefore, the very actions of the company itself and thus the company couldn't argue that the loss occurred without its actual fault or privity.

36. It is these observations of Viscount Haldane that gave rise to the notion of "directing mind and will" of the company. However, it is important to note that the House of Lords in ***Lennard's Carrying*** (*supra*) was not dealing with a criminal offence. Rather, the question was whether the appellant was entitled to a statutory defence exempting a shipowner from liability as the loss had occurred without its "actual fault or privity". Further, the House of Lords does not explicitly hold that where a person acts as the company, that person's state of mind is, for that reason, also to be treated as the state of mind of the company. Such explicit recognition came only later, in ***Tesco Supermarkets*** (*supra*).

(a) <u>Tesco Supermarkets Ltd. v. Nattrass</u>

37. In ***Tesco Supermarkets*** (*supra*), the appellants, owners of a large number of supermarkets, from time to time sold "flash packs" by way of advertisement at prices lower than the normal price. In September 1969 they were selling Radiant washing powder in this way. Posters were

displayed in the shops drawing attention to the reduction in price. This was also the case in the appellants' shop at Northwich, where an old age pensioner saw the poster and went to buy a pack. He could only find packs marked at the normal price. He took one to the cashier, who told him that there were none in stock at the reduced price. He paid the normal price and complained to an inspector of weights and measures, which resulted in a prosecution under the Trade Descriptions Act 1968.

38. This had come about because the evening before, the shop assistant had found the discounted "flash pack" stock exhausted and restocked the shelf with ordinary priced packets, but failed to inform the manager of this. The manager, who was responsible for ensuring the correct packs were displayed, failed to check the shelf himself and incorrectly recorded in his daily return that all special offers were "OK".

39. Section 11(2) of the Act made it an offence for any person offering to supply goods to indicate that the goods were being offered at a price lower than that at which they were in fact offered. It was not disputed that the section applied to this case. The appellants relied on the defence under Section 24(1), which required proof that: (a) the commission of the offence was, among other things, due to the act or default of "another person"; and (b) all reasonable precautions and due diligence were exercised to avoid the commission of the offence, whether by himself or any person under his control.

40. In essence, the appellant's contention was as follows: (i) as the manager was merely a cog in a vast machine, not the alter ego of the company, the manager's failure to check the shelf and correctly verify the stock meant the offence was committed due to the act or default of "another person", thereby satisfying Section 24(1)(a); and (ii) they had taken all reasonable precautions and exercised all due diligence to avoid the commission of the offence, thereby satisfying Section 24(1)(b).

41. The judges agreed that the conduct of the manager in this case could not be treated as an act of the company itself and, thereby, his actions would be considered as that of "another person" under Section 24(1)(a). First, let us consider the often-cited speech of Lord Reid. The following are the relevant extracts:

> *"I must start by considering the nature of the 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. <u>He is acting as the company and his mind which directs his acts is the mind of 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 or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company.</u> It must be a question of law whether, <u>once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability.</u>*
>
> *In Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd. [1915] A.C. 705 the question was whether damage had occurred without the "actual fault or privity" of the owner of a ship. The owners were a company. The fault was that of the registered managing owner who managed the ship on behalf of the owners and 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. Viscount Haldane L.C. said, at pp. 713, 714:*
>
>> *"For if Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself within the meaning of section 502 … It must be upon the true construction of that section in such a case as the present one that the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respond eat superior, but somebody for whom the company is liable because his action is the very action of the company itself."*

Reference is frequently made to the judgment of Denning L.J. in H. L. Bolton (Engineering) Co. Ltd. v. T. J. Graham & Sons Ltd. [1957] 1 Q.B. 159. He said, at p. 172:

> *"A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such."*

In that case the directors of the company only met once a year: they left the management of the business to others, and it was the intention of those managers which was imputed to the company. I think that was right. <u>There have been attempts to apply Lord Denning's words to all servants of a company whose work is brain work, or who exercise some managerial discretion under the direction of superior officers of the company. I do not think that Lord Denning intended to refer to them. He only referred to those who "represent the directing mind and will of the company, and control what it does."</u>

*I think that is right for this reason. <u>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.</u> Their subordinates do not. <u>They carry out orders from above and it can make no difference that they are given some measure of discretion</u>**.** But the board of directors may delegate <u>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</u>**.** Lennard's case [1915] A.C. 705 was one of them.*

<u>In some cases the phrase alter ego has been used. I think it is misleading. When dealing with a company the word alter is I think misleading. The person who speaks and acts as the company is not alter. He is identified with the company. And when dealing with an individual no other individual can be his alter ego.</u> The other individual can be a servant, agent, delegate or representative but I know of neither principle nor authority which warrants the confusion (in the literal or original sense) of two separate individuals.

XXX

The Divisional Court decided this case on a theory of delegation. In that they were following some earlier authorities. But they gave far too wide a meaning to delegation. I have said that a board of directors can delegate part of their functions of management so as to make their delegate an embodiment of the company within the sphere of the delegation. But here the board never delegated any part of their functions. They set up a chain of command through regional and district supervisors, but they remained in control. The shop managers had to obey their general directions and also take orders from their superiors. The acts or omissions of shop managers were not acts of the company itself.

[Emphasis Supplied]

42. To put it concisely, the central points that emerge from Lord Reid's speech are as follows:

a. *First*, there are certain instances where a person is not acting "on behalf of" the company but rather as its "embodiment". In such instances, the guilty mind of the person is the guilty mind of the company. This is distinct from vicarious liability, where the person is still acting as the "agent/servant" of the company rather than as the company itself. Reliance was placed upon the decision of the House of Lords in ***Lennard's Carrying*** (*supra*).

b. *Secondly*, it must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent.

c. *Thirdly*, normally it is the board of directors, the managing director, and perhaps other superior officers of a company who carry out the management of the company and can accordingly be regarded as acting as the company. A person may also be said to act as the company where the board delegates its powers to that person and thereby vests in them full discretion to act independently of the board's instructions. Mere exercise of some "managerial discretion" under the supervision of the superior officers will not make a person the "directing mind and will" of the company.

d. *Fourthly,* in the facts of the present case, there was no delegation of their functions by the board of directors to the store manager, and thus the manager could not be considered as an embodiment of the company.

43. Let us also briefly consider the other four speeches by Lord Morris, Viscount Dilhorne, Lord Pearson and Lord Diplock respectively:

Lord Morris

"[...] The very basis of section 24 involves that some contraventions of the Act may take place and may be contraventions by persons under the control of the company even though the company itself has taken all reasonable precautions and exercised all due diligence and that the company will not be criminally answerable for such contraventions. <u>How, then, does a company act? When is some act the act of the company as opposed to the act of a servant or agent of the company (for which, if done within the scope of employment, the company will be civilly answerable)?</u>

XXX

[...] The question in the present case becomes a question whether the company as a company took all reasonable precautions and exercised all due diligence. The magistrates so found and so held. The magistrates found and held that "they" (i.e. the company) had satisfied the provisions of section 24 (1) (b). The reason why the Divisional Court felt that they could not accept that finding was that they considered that the company had delegated its duty to the manager of the shop. The manager was, they thought, "a person whom the appellants had delegated in respect of that particular shop their duty to take all reasonable precautions and exercise all due diligence to avoid the commission" of an offence. Though the magistrates were satisfied that the company had set up an efficient system there had been "a failure by someone to whom the duty of carrying out the system was delegated properly to carry out that function."

<u>My Lords, with respect I do not think that there was any feature of delegation in the present case. The company had its responsibilities in</u>

regard to taking all reasonable precautions and exercising all due diligence. The careful and effective discharge of those responsibilities required the directing mind and will of the company. A system had to be created which could rationally be said to be so designed that the commission of offences would be avoided. There was no delegation of the duty of taking precautions and exercising diligence. There was no such delegation to the manager of a particular store. He did not function as the directing mind or will of the company. His duties as the manager of one store did not involve managing the company. He was one who was being directed. He was one who was employed but he was not a delegate to whom the company passed on its responsibilities. He had certain duties which were the result of the taking by the company of all reasonable precautions and of the exercising by the company of all due diligence. He was a person under the control of the company and on the assumption that there could be proceedings against him, the company would by section 24 (1) (b) be absolved if the company had taken all proper steps to avoid the commission of an offence by him. To make the company automatically liable for an offence committed by him would be to ignore the subsection. He was, so to speak, a cog in the machine which was devised: it was not left to him to devise it. Nor was he within what has been called the "brain area" of the company. If the company had taken all reasonable precautions and exercised all due diligence to ensure that the machine could and should run effectively then some breakdown due to some action or failure on the part of "another person" ought not to be attributed to the company or to be regarded as the action or failure of the company itself for which the company was to be criminally responsible. The defence provided by section 24 (1) would otherwise be illusory."

Viscount Dilhorne

"If an offence under section 11 (2) is committed by a company, the acts necessary to constitute the offence must have been done by individuals in their employ. Here the question is not whether the company is criminally liable and responsible for the act of a particular servant but whether it can escape from that liability by proving that it exercised all due diligence and took all reasonable precautions and that the commission of the offence was due to the act or omission of another person. That, in my view, is a very different question from that of a company's criminal responsibility for its servants' acts.

XXX

[...] In my view, a person who is in actual control of the operations of a company or of part of them and who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under his orders, cannot be regarded as "another person" within the meaning of sections 23 and 24 (1) (a).

XXX

However this may be, shop managers in a business such as that conducted by the appellants — and their number may be of the order of eight hundred if the appellants have that number of shops — cannot properly be regarded as part of the appellants' directing mind and will and so can come within the reference to "another person" in sections 23 and 24 (1) (a)."

Lord Pearson

"Section 24 requires a dividing line to be drawn between the master and any other person. The defendant cannot disclaim liability for an act or omission of his ego or his alter ego. In the case of an individual defendant, his ego is simply himself, but he may have an alter ego. For instance, if he has only one shop and he appoints a manager of that shop with full discretion to manage it as he thinks fit, the manager is doing what the employer would normally do and may be held to be the employer's alter ego. But if the defendant has hundreds of shops, he could not be expected personally to manage each one of them and the manager of one of his shops cannot in the absence of exceptional circumstances be considered his alter ego. In the case of a company, the ego is located in several persons, for example, those mentioned in section 20 of the Act or other persons in a similar position of direction or general management. 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.

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 subordinate 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."

Lord Diplock

"My Lords, a corporation incorporated under the Companies Act 1948 owes its corporate personality and its powers to its constitution, the memorandum and articles of association. The obvious and the only place to look to discover by what natural persons its powers are exercisable, is in its constitution. [...]

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 or 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.

XXX

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. The Trade Descriptions Act 1968 , however, so far from containing anything which compels one to reject that test, recognises, by section 20, the distinction between "any director, manager, secretary or other similar officer of a body corporate" and other persons who are merely its servants or agents. [...]

The natural persons described in this subsection correspond with those who under the memorandum and articles of association of a company exercise the powers of the company itself. From this it follows that if any of them is guilty of neglect in the exercise of those powers such neglect is that of the company itself. That it cannot be relied upon as "the act or default of another person," so as to entitle the company to a defence under section 24 (1), is implicit in the provision in section 20 (1) that a person in the described category shall be guilty of an offence "as well as the body corporate." Without section 20 it would have been open to doubt whether persons whose acts were in law the acts of the company itself would have been guilty in their personal capacity also of the offence committed by the company."

[Emphasis Supplied]

44. First and foremost, it is worth situating the ruling in ***Tesco Supermarkets*** (*supra*) within the context in which it arose. As Viscount Dilhorne observed, the question before the House was not whether the company was criminally liable for the acts of a particular servant at all, but whether it could escape such liability by showing that it had exercised due diligence and that the offence was due to the act or default of another person. This, in his view, was a materially different question from that of a company's criminal responsibility for the acts of its servant.

45. While the five judges employed differing terminology to refer to such persons (describing them, variously, as the company's "alter ego" its "directing mind and will" or its "embodiment") they all converged on the understanding that there exist certain persons who, when they act, act as the company itself, such that their acts and state of mind are, in law, the acts and state of mind of the company. This understanding thereby supplied the necessary basis for holding that a company could possess *mens rea* and thereby be held liable for offences requiring it.

46. On the question of who, precisely, qualifies to be a company's embodiment, the judges did not speak with one voice. For Lord Reid, this would normally be the board of directors, the managing director, and perhaps other superior officers of the company. For Viscount Dilhorne, it would be those in actual control of the company's operations, or a part of them, who are answerable to no one else within the company for how they discharge their duties. For Lord Pearson, it would be those described in Section 20 of the Act (a director, manager, secretary, or other similar officer) or persons in a similar position of direction or management. For Lord Diplock, it would be those persons who, under the company's constitutional documents, i.e., its memorandum and articles of association, are entrusted with the exercise of the company's powers.

47. Notwithstanding this divergence, there is clarity to the extent that all the judges, in one form or another, accepted the delegation principle: where a person has been delegated power with full discretion, i.e., power exercised without being subject to instructions or oversight from anyone above them, that person too becomes an embodiment of the company. This principle bore squarely on the facts before the House of Lords, since the central question was whether the board had delegated any part of its functions to the store managers, and all five judges answered this in the negative.

48. A closer look at the extracts of Lord Reid and Lord Pearson set out above, and, on a liberal reading, even that of Lord Diplock, suggests that they

were saying something more than this. Apart from the delegation principle, they also seem to accept that senior management can act as the embodiment of the company. However, with respect to such persons, they do not explicitly refer to any requirement of full discretion. This may be because the full discretion threshold exists specifically to circumscribe the delegation principle. Almost every employee exercises some discretion, and without the requirement that this discretion be full, i. e, exercised free of any residual check from above, almost every employee could be said to bind the company. That concern does not arise in the same way for senior management, who, even without a grant of such discretion, typically enjoy a wide scope to act independently and possess the ability to influence decisions and outcomes. Consequently, status itself may be said to operate as a standalone route to attribution, independent of the delegation principle. Whether the House of Lords itself intended to establish such a route is not entirely clear, since the position of such senior officers was not directly in issue on the facts before it. What can be said, however, is that ***Tesco Supermarkets*** (*supra*) was applied in practice as though it did establish such a route.

49. This process of identifying those persons who, when they act, act as the company itself, such that their acts and state of mind may in law be treated as those of the company, has since come to be known as the identification doctrine. From our discussion above, it appears to us that the House of Lords in ***Tesco Supermarkets*** (*supra*) envisages two possible pathways under the identification doctrine. *First*, the delegation method, under which those natural persons are identified as the company who have been delegated power to act with full discretion, unfettered by the control of any superior authority within the company. *Second*, the status based method, under which certain natural persons are identified as the company by virtue of the status of the office they hold within the company's management.

50. As Lord Reid and Lord Pearson remarked, it is not always easy to identify persons who can be said to act as the company. In ***Tesco Supermarkets*** (*supra*), this difficulty was substantially resolved by common sense, as in an 800-store supermarket chain, the manager of a single store could not sensibly be regarded as its directing mind and will, and it was in any event clear that the board had delegated no part of its functions to him. A further consideration reinforcing this outcome, referred to by Lord Morris and Lord Diplock in their speeches, was that if a company which had taken all reasonable precautions and exercised due diligence could nonetheless be held liable for the actions or failures of its manager, the defence provided under section 24(1) would be rendered illusory. The position in ***Lennard's Carrying*** (*supra*) was similarly straightforward, given that Mr. Lennard had himself taken an active part in managing the ship and was registered as the designated person for that purpose. As the cases discussed below will show, the facts will not always yield such an easy answer.

51. The identification doctrine, as laid down in ***Tesco Supermarkets*** (*supra*), came under heavy criticism because of the narrow scope it provided for attribution. On the formulation that emerged from the case, there were only two plausible pathways by which a person could be said to be acting as the company, both of which captured a very small group of people: (i) delegation with full discretion, which in many cases will be difficult to establish; and (ii) the route of senior management, which meant that a company could be held liable for offences requiring *mens rea* only where one of its senior officers had acted with the requisite fault. Compounding this narrowness was the further difficulty that it was not clear as to who would or would not count as senior management.

52. Further, this formulation of the identification doctrine came to be misunderstood in two ways. *First*, it was treated as a universal test, applicable regardless of context. *Second*, it was treated as providing an exhaustive list of those whose acts or state of mind could be attributed to

a corporation.[12] Such rigidity proved untenable, and it was the Privy Council's decision in ***Meridian Global Funds Management Asia Ltd. v. Securities Commission***, reported at **[1995] 2 A.C. 500,** that paved the way for the necessary course correction.

(b) Meridian Global Funds Management Asia Ltd v. Securities Commission

53. In ***Meridian Global*** (*supra*), a group of persons in New Zealand, Malaysia, and Hong Kong sought to gain control of a publicly listed New Zealand company, Euro-National Corporation Ltd. ("**ENC**"), with a view to using ENC's assets for their own purposes. Among them were K (Meridian's chief investment officer) and N (Meridian's senior portfolio manager). Their scheme required them to acquire a controlling holding in ENC, with the intention of ultimately funding this acquisition out of ENC's own assets. This, however, required bridging finance to cover the gap between acquiring the shares and gaining control of ENC's money. It was this bridging finance that K and N supplied by improperly using their authority over funds managed by Meridian and channelling it towards the purchase of the ENC shares. This was done without the knowledge of the company's board of directors or managing director.

54. As a result of such purchase of ENC shares, Meridian became a "substantial security holder" in ENC, triggering a duty to give notice under section 20(3) of the Securities Amendment Act 1988. A duty the company failed to discharge. The Securities Commission accordingly instituted proceedings against the company in the High Court of New Zealand, which held that the company was in breach of section 20(3), attributing the knowledge of K and N to the company. The Court of Appeal of New Zealand upheld this finding, holding that K was the directing mind and will of the company, such that his knowledge was properly attributable to it.

[12] *Supra note* 3 at 63.

55. Before the Privy Council, the company argued that it had neither actual nor constructive knowledge of having acquired a "relevant interest" in the issuer. Any inquiry into whether a person is to be identified with a company, it contended, must begin with the company's constitutional instruments, i.e., its memorandum and articles of association, which show where the power to act on the company's behalf is located. *Prima facie*, this would be its managing director and board of directors. While a single director or other individual could, in a particular context, be the directing mind and will of the company, this required that person to enjoy full independence from the board, something distinct from a mere measure of discretion. On the facts, neither K nor N was an officer identified in the company's constitutional instruments. Further, K performed his duties in the field of investment activity under the supervision of the managing director, and thus held only some discretion, without ultimate responsibility for the company's investment activities. Consequently, the company argued, K could not be regarded as its directing mind and will.

56. Before turning to the decision of the Privy Council, it is useful to first set out, in simple terms, the framework Lord Hoffmann laid down in ***Meridian Global*** (*supra*). According to Lord Hoffmann, since a company is an abstraction, the law must therefore supply rules to decide whose acts, in a given situation, will be treated as the company's own acts. He described these as "rules of attribution" and captured their essence in the following manner:

> *"There is in fact no such thing as the company as such, no ding an sich, only the applicable rules. <u>To say that a company cannot do something means only that there is no one whose doing of that act would, under the applicable rules of attribution, count as an act of the company</u>."*

[Emphasis Supplied]

57. Lord Hoffmann identified three distinct kinds of rules of attribution:

a. *First,* the primary rules of attribution. These are found in a company's own constitutional documents, typically its articles of association, and will say things such as "for the purpose of appointing members of the board, a majority vote of the shareholders shall be a decision of the company" or "the decisions of the board in managing the company's business shall be the decisions of the company". There are also primary rules of attribution which are not expressly stated in the articles but implied by company law. These primary rules of attribution are obviously not enough to enable a company to go out into the world and do business. Not every act on behalf of the company could be expected to be the subject of a resolution of the board or a unanimous decision of the shareholders.

b. This is where the *second* kind of rules come in: the general rules of attribution. The company builds upon the primary rules of attribution by using general rules of attribution which are equally available to natural persons, i.e., the principles of agency. It will appoint servants and agents whose acts, by a combination of the general principles of agency and the company's primary rules of attribution, count as the acts of the company. Between the primary rules and the general rules, a company can function, and its employees, even those well below board level, can bind it.

c. The company's primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations. In exceptional cases, however, they will not provide an answer. This will be the case when a rule of law, either expressly or by implication, excludes attribution based on the general principles of agency or vicarious liability. For example, a rule may be stated in language primarily applicable to a natural person and require some act or state of mind on the part of that person "himself," as opposed to his servants or agents. This is generally true of rules of the criminal law, which ordinarily impose liability only for the *actus reus* and *mens rea* of the defendant himself. How is such a rule to be applied to a company? In such cases, the court may conclude that the rule was not intended to apply to companies at all, or it may interpret the law to allow attribution only based on the primary rules. But there will be many cases in which neither of these solutions is satisfactory. These are cases where the court considers that the law was intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such situations, the *third* kind of rule comes: a special rule of attribution, fashioned by the court and tailored to the particular statutory provision in question, to give effect to what the legislature actually intended.

58. On the question of when a court should fashion a special rule of attribution, Lord Hoffmann said as follows:

> *"This is always a matter of interpretation: given that it was intended to apply to a company, <u>how was it intended to apply? Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy."</u>*

[Emphasis Supplied]

59. Further, as per Lord Hoffman, the fact that the rule of attribution is a matter of interpretation or construction of the relevant substantive rule is shown by the contrast between two decisions of the House of Lords in ***Tesco Supermarkets*** (*supra*) and in ***In re Supply of Ready Mixed Concrete (No. 2)***, reported in **[1995] 1 A.C. 456.** As we noted above, in ***Tesco Supermarkets*** (*supra*), on examining the purpose of section 24(1), some Lords concluded that the acts and defaults of the manager were not intended to be attributed to the company. In contrast, in ***Ready Mixed Concrete*** (*supra*), based on the substantive rule before it, the House of Lords concluded that the acts and the state of mind of the employees ought

to be attributed to the company. The following is Lord Hoffmann's own account of ***Ready Mixed Concrete*** (*supra*):

> *"On the other hand, in In re Supply of Ready Mixed Concrete (No. 2) [1995] 1 A.C. 456, a restrictive arrangement in breach of an undertaking by a company to the Restrictive Practices Court was made by executives of the company acting within the scope of their employment. The board knew nothing of the arrangement; it had in fact given instructions to the company's employees that they were not to make such arrangements. But the House of Lords held that for the purposes of deciding whether the company was in contempt, the act and state of mind of an employee who entered into an arrangement in the course of his employment should be attributed to the company. This attribution rule was derived from a construction of the undertaking against the background of the Restrictive Trade Practices Act 1976: such undertakings by corporations would be worth little if the company could avoid liability for what its employees had actually done on the ground that the board did not know about it. As Lord Templeman said, at p. 465, an uncritical transposition of the construction in Tesco Supermarkets Ltd. v. Nattrass [1972] A.C. 153:*
>
>> *"would allow a company to enjoy the benefit of restrictions outlawed by Parliament and the benefit of arrangements prohibited by the courts provided that the restrictions were accepted and implemented and the arrangements were negotiated by one or more employees who had been forbidden to do so by some superior employee identified in argument as a member of the 'higher management' of the company or by one or more directors of the company identified in argument as 'the guiding will' of the company.""*

[Emphasis Supplied]

60. There is one other point from Lord Hoffmann's opinion which merits discussion. According to Lord Hoffmann, the phrase "directing mind and will" has come to be misconstrued in the years since ***Lennard's Carrying*** (*supra*). A closer look at that case shows that Viscount Haldane was using the notion of directing mind and will simply to apply the attribution rule derived from section 502, i.e., to identify the person in the company whose functions corresponded to those expected of an individual shipowner, to whom the language of section 502 primarily applied. On the facts, this turned out to be Mr. Lennard, who also happened to be the person who ran the company's business generally, since the company's activities were

confined entirely to ships. It was this coincidence (that the same person satisfied both roles) which left Viscount Haldane's speech open to the interpretation that he was expounding a general metaphysic of companies, when in fact he was engaged in a statute-specific inquiry, and not the discovery of some general, all-purpose "directing mind" of the company.

61. Later courts, by placing undue emphasis on the phrase rather than on the purpose for which Viscount Haldane used it, misconstrued the exercise. The error lay in chasing the label itself (asking simply "who is the directing mind of this company?"). This chase, as Lord Hoffmann shows, produced real anomalies. It led to cases where the person identified as the company's "directing mind and will" had little real connection to the act in question. The real exercise was, however, never to locate a company's "brain" in the abstract. As Lord Hoffmann remarked, the term "directing mind and will" *will often be the most appropriate description of the person designated by the relevant attribution rule, but it might be better to acknowledge that not every such rule has to be forced into the same formula.*

62. Having laid down the three rules of attribution and established that the question is one of construction, Lord Hoffmann proceeded to apply this framework to the facts before him as follows:

> *"Once it is appreciated that the question is one of construction rather than metaphysics, the answer in this case seems to their Lordships to be as straightforward as it did to Heron J. The policy of section 20 of the Securities Amendment Act 1988 is to compel, in fast-moving markets, the immediate disclosure of the identity of persons who become substantial security holders in public issuers. Notice must be given as soon as that person knows that he has become a substantial security holder. In the case of a corporate security holder, what rule should be implied as to the person whose knowledge for this purpose is to count as the knowledge of the company? Surely the person who, with the authority of the company, acquired the relevant interest. Otherwise the policy of the Act would be defeated. Companies would be able to allow employees to acquire interests on their behalf which made them substantial security holders but would not have to report them until the board or someone else in senior management got to know about it. This would put a premium on the board paying as little attention as possible to what its investment managers were doing. Their Lordships would*

therefore hold that upon the true construction of section 20(4)(e), the company knows that it has become a substantial security holder when that is known to the person who had authority to do the deal. It is then obliged to give notice under section 20(3). The fact that Koo did the deal for a corrupt purpose and did not give such notice because he did not want his employers to find out cannot in their Lordships' view affect the attribution of knowledge and the consequent duty to notify.

It was therefore not necessary in this case to inquire into whether Koo could have been described in some more general sense as the "directing mind and will" of the company. But their Lordships would wish to guard themselves against being understood to mean that whenever a servant of a company has authority to do an act on its behalf, knowledge of that act will for all purposes be attributed to the company. It is a question of construction in each case as to whether the particular rule requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company. Sometimes, as in In re Supply of Ready Mixed Concrete (No. 2) [1995] 1 A.C. 456 and this case, it will be appropriate. Likewise in a case in which a company was required to make a return for revenue purposes and the statute made it an offence to make a false return with intent to deceive, the Divisional Court held that the mens rea of the servant authorised to discharge the duty to make the return should be attributed to the company: see Moore v. I. Bresler Ltd. [1944] 2 All E.R. 515. On the other hand, the fact that a company's employee is authorised to drive a lorry does not in itself lead to the conclusion that if he kills someone by reckless driving, the company will be guilty of manslaughter. There is no inconsistency. Each is an example of an attribution rule for a particular purpose, tailored as it always must be to the terms and policies of the substantive rule."

[Emphasis Supplied]

63. Lord Hoffmann's approach, as is evident from the extract above, was not to determine whether K was, in some general sense, the "directing mind and will" of the company. Instead, he sought to answer a specific question: in the case of a corporate security holder, whose knowledge should count as the knowledge of the company for section 20? His answer was that such knowledge should be attributed to whoever, with the company's authority, had actually acquired the relevant interest, which in this case was K. Any other answer, he reasoned, would defeat the very purpose of the disclosure requirement, since a company could then avoid liability by ensuring its board remained ignorant of what its own investment managers were doing. It made no difference to this conclusion, in his view,

that K had acquired the relevant interest for a corrupt purpose, or that he had withheld disclosure precisely because he did not want the company to find out what he had done.

64. It is worth pausing, at this stage, to consider what the framework laid down in ***Meridian Global*** (*supra*) achieved. *First*, the decision established attribution as an exercise governed by rules, i.e., rules that determine when the act of a natural person is to be treated as the act of the company, thereby permitting the imputation of both act and state of mind to the corporation. *Second*, it cautioned against locating the 'directing mind and will' in the abstract, or by resorting to a kind of corporate metaphysics, as though the company possessed a single, identifiable 'brain'. Instead, it held that it is the rules themselves which must point to the relevant person. *Third*, it permitted the question of attribution to be answered by reference to the context and purpose of the statutory rule in question. Taken together, ***Meridian Global*** (*supra*) makes it clear that 'directing mind and will' is not a fixed or exhaustive category of persons, but a conclusion reached by applying the relevant rule to the facts at hand. As a consequence, the framework allowed for a considerably more flexible approach to attribution than that envisaged under ***Tesco Supermarkets*** (*supra*).

65. One further question that might arise at this juncture is as to what is the difference between the identification doctrine as envisaged in ***Tesco Supermarkets*** (*supra*) and the rules of attribution conceived in ***Meridian Global*** (*supra*). Though the two appear to proceed differently, they are, in substance, directed at the same underlying question, i.e., whether the act and state of mind of the concerned person should be considered as the act and state of mind of the company. The identification doctrine asks whether the person concerned is *acting as an embodiment of the company*. The rules of attribution, by contrast, ask whether the act done by that person *would count as the act of the company*. The difference is one of form and not of substance.

66. What remained unclear was how the identification doctrine envisaged under ***Tesco Supermarkets*** (*supra*) and the rules of the attribution framework envisaged by Lord Hoffman in ***Meridian Global*** (*supra*) would operate together. The Crown Court's decision in ***The Queen v. Barclays PLC & Barclays Bank PLC*** **(**Indictment No: T2017 7247-7251 & T2018 0055**)** and the High Court's decision in ***The Serious Fraud Office v. Barclays PLC & Anr***, reported in **[2018] EWHC 3055 (QB)** (together referred to as the "***Barclays cases***") go some way toward answering this question.

(c) <u>The Barclays Cases</u>

67. Barclays PLC and Barclays Bank PLC (together, "**Barclays**") raised capital on two occasions in 2008, amid the global financial crisis: a first raising in June 2008 ("**CR1**"), and a second in October 2008 ("**CR2**"). Among the investors was the State of Qatar, acting through various entities ("**Qatar**"). As is standard in such transactions, Qatar was to be paid a commission for subscribing, and this commission was publicly disclosed in the Prospectuses and Subscription Agreements, which stated that Qatar was receiving the same terms as other investors and no additional fees. In reality, it was alleged, Barclays had secretly agreed to pay Qatar substantially higher fees than disclosed, structured through two side agreements described as "Advisory Services Agreements" ("**ASA**") under which the Qatar entities were purportedly to provide advisory services to Barclays in exchange for payments. It was alleged that these advisory services were fictitious, and that the payments were, in substance, disguised additional commissions paid to secure the participation of Qatar, concealed to avoid triggering an obligation to pay the same higher rate to other investors.

68. Separately, and around the same time as CR2, Barclays Bank lent US$3 billion to Qatar. It was alleged that this loan was used by Qatar to help fund its investment in CR2, which is prohibited by company law as a form of unlawful financial assistance. The individuals said to have negotiated

and driven these arrangements on Barclays' side were John Varley (Group Chief Executive), Roger Jenkins (a senior investment banking executive), and Christopher Lucas (Group Finance Director) and a few others. It was on this factual basis that criminal proceedings were brought against Barclays and these individuals.[13]

69. Barclays applied to have the charges against it dismissed, arguing that the alleged wrongdoing of its officers could not, in law, be treated as the wrongdoing of the company itself. Since the case was for dismissal of charges, the court had to proceed on the basis that the prosecution's case was true. The Crown Court agreed, and dismissed all charges against Barclays. The prosecution then sought to revive the case against Barclays before the High Court. The High Court also ruled against the prosecution, upholding the conclusion that the conduct of officers could not be attributed to the company. Proceedings against Barclays accordingly came to an end, though those against the individuals continued. The individuals were subsequently acquitted.

70. The discussion below on the ***Barclays cases*** (*supra*) is organised in four parts: first, the principles that the courts drew from their reading of ***Meridian Global*** (*supra*); second, the test the courts arrived at for determining whose knowledge is to be attributed to a company; third, the application of that test to the facts before it; and fourth, the aspects in which the reasoning in the cases diverged from the approach taken in ***Tesco Supermarkets*** (*supra*) and ***Meridian Global*** (*supra*). Given the complexity of the facts, precedents, and reasoning involved, what follows is a necessarily general account of the approach and reasoning adopted by the courts in the ***Barclays cases*** (*supra*).

(i) <u>Meridian Principles</u>

[13] For a detailed account of the facts, see: ¶ 37-81 of the Crown Court Decision & ¶ 18-38 of the High Court Decision.

71. Drawing on its reading of ***Meridian Global*** (*supra*), the courts in the ***Barclays cases*** (*supra*) identified the following principles as guiding their approach:

a. *First*, "directing mind and will" is not itself a test. It is, at most, a suitable description of the person designated by the applicable rule of attribution. Thus, the correct starting point is accordingly not some generalised notion of the status, seniority, or authority of the individual in question, but an examination of which rule, if any, may apply to the facts in the particular statutory context.[14]

b. *Secondly*, although ***Meridian Global*** (*supra*) was not, in the strict sense, a criminal case as the New Zealand statute in issue was quasi-criminal, carrying penal consequences. However, that wouldn't bar its reasoning from being applicable to criminal statutes as well.[15]

c. *Thirdly*, a company's directing mind and will may be found in different persons for different purposes of the company. There is no requirement that a single person or body be identified as the company's directing mind for all purposes.[16]

d. *Fourthly*, ***Meridian Global*** (*supra*) requires a sequenced or layered approach to attribution: the primary rules of attribution (found in the company's constitution) and the general rules (ordinary principles of agency) are first to be considered, and it is only where these prove insufficient that a special rule of attribution, derived from the purpose of the relevant statute, need be fashioned.[17]

e. *Lastly*, "special" is not to be equated with "exceptional". A special rule of attribution is not the product of some residual or

[14] ¶ 119 of the Crown Court Decision.
[15] ¶ 128 of the Crown Court Decision.
[16] ¶ 129 of the Crown Court Decision.
[17] ¶ 130 of the Crown Court Decision.

extraordinary judicial function. It is simply a rule tailored to the terms, policy, and purpose of the particular statute under consideration, arrived at through ordinary principles of statutory construction.[18]

(ii) Test for Determining Attribution

72. It seemed clear that both ***Tesco Supermarkets*** (*supra*) and ***Meridian Global*** (*supra*) respectively laid down tests capable of attributing acts and states of mind to corporations, and both had, by this stage, gained acceptance and application in the criminal context. However, ***Tesco Supermarkets*** (*supra*) did not envisage the sequenced approach that ***Meridian Global*** (*supra*) later set out and thus it was unclear how the erstwhile identification doctrine was meant to operate within the framework laid down by Lord Hoffman.

73. Both courts in ***Barclays cases*** (*supra*) were unequivocal that ***Meridian Global*** (*supra*) did not, and could not, displace the test laid down in ***Tesco Supermarkets*** (*supra*).[19] The prevailing test for attribution in criminal cases, they held, remained the identification doctrine as established in ***Tesco Supermarkets*** (*supra*).[20] The courts relied on precedents of the Court of Appeal to affirm this position. It was only where consideration of the statute creating the offence in question pointed to a different, and perhaps broader, approach that ***Meridian Global*** (*supra*) would come into play.[21]

74. This might appear to sit uneasily with the Crown Court's further finding that there is no "true identification" principle, just a hierarchy of primary, general and special rules derived from ***Meridian Global*** (*supra*), which govern attribution in criminal cases as well. However, the tension is resolved when we understand that the courts did not treat the identification doctrine envisaged in ***Tesco Supermarkets*** (*supra*) as being

[18] ¶ 131 of the Crown Court Decision.
[19] ¶ 83-85 of the High Court Decision.
[20] ¶ 66 of the High Court Decision.
[21] ¶ 76 of the High Court Decision.

outside the framework laid down in ***Meridian Global*** (*supra*). Instead, as will be shown below, they seem to treat the identification doctrine as being covered within the primary and general rules of attribution.[22] The consequence of such a reading is that ***Meridian Global's*** (supra) true contribution is seen as confined to allowing for special rules to be fashioned.[23] How the courts in ***Barclays cases*** (*supra*) approached each of these rules is considered below.

75. At the stage of inquiry dealing with primary rules of attribution, the courts in ***Barclays cases*** (*supra*) envisaged that the inquiry would be confined to the company's constitutional documents, i.e., its articles of association and related governing instruments. The question at this stage was narrow: in whom did these documents vest the relevant power, and, where they permitted delegation, to whom such power had in fact been delegated.[24] Vesting power in a particular person meant that their acts and state of mind would, in consequence, be treated as those of the company itself. This approach bears a close resemblance to the one suggested, in part, by Lord Diplock in ***Tesco Supermarkets*** (*supra*), where he indicated that it would be those persons named or empowered under the company's constitution whose acts and state of mind would be treated as the acts and state of mind of the company.

76. As discussed above, general rules of attribution are the ordinary principles of agency, applicable equally to natural persons and to companies. However, since vicarious liability has no place in offences requiring proof of *mens rea*, as was the case in the ***Barclays cases*** (*supra*), the courts came to rely instead on the general agency principle of implied delegation, i.e., whether the person had been impliedly delegated authority to act for the company. In reaching this position, the Crown Court examined ***Lennard's Carrying*** (*supra*) and ***Tesco Supermarkets*** (*supra*), and found that, although each decision contained hints of reliance on a special rule of attribution as

[22] ¶ 135 of the Crown Court Decision.
[23] ¶ 136 - 138 of the Crown Court Decision.
[24] ¶ 167 of the Crown Court Decision.

well, the decision in both cases appears, in substance, to have been reached based on the principle of implied delegation.[25]

77. Proceeding on this understanding, the courts in the ***Barclays cases*** (*supra*) framed the inquiry into implied delegation as one of 'authority to do the deal', i.e., whether the person in question possessed full discretion to act independently and conclude the transaction on behalf of the company.[26] This emphasis on authority follows from the ordinary principles of agency themselves, where a principal is bound only by the acts of its agent that were authorised. The courts accordingly noted that the limits of implied delegation must be carefully analysed and held that it involves a question of examining whether what happened was within the scope of the person's delegation, so that he can be regarded as acting as the company.[27]

78. In testing for implied delegation, the courts in ***Barclays cases*** (*supra*) discussed precedents in which de facto authority to do the deal was found to vest in a person.[28] Such a discussion may have been warranted by the prosecution's stance that notwithstanding the formal structures in place, it was the individuals concerned who, in effect, had full control over securing Qatar's participation in the transactions. This potentially covered scenarios where a person, without any explicit grant of authority, nonetheless controlled the entirety of the transaction.

79. It thus appears that the courts in ***Barclays cases*** (*supra*) envisaged the identification doctrine as laid down in ***Tesco Supermarkets*** (*supra*) as recognising only the delegation mode of attribution, a mode which is itself accommodated within the primary and general rules of attribution discussed above. The evident consequence of this reading was that the status based route stood discarded, an aspect considered more closely below.[29] Further, such an understanding also clarifies why the courts held

[25] ¶ 119 – 124 of the Crown Court Decision.
[26] ¶ 118 – 119 of the High Court Decision.
[27] ¶ 123 of the Crown Court Decision.
[28] ¶ 140-143 & 147-152 of the Crown Court Decision.
[29] ¶ 68 of the High Court Decision.

that the identification doctrine as established in ***Tesco Supermarkets*** (*supra*) prevailed, and the only case where consideration of the statute creating the offence in question pointed to a different, and perhaps broader, approach would ***Meridian Global*** (*supra*) come into play.

80. Consistent with its recognition that the directing mind and will of a company may lie with different persons for different purposes, the courts in ***Barclays cases*** (*supra)* confined their inquiry into implied delegation to the particular transaction in question.[30] The relevant question was not whether the person had been delegated authority over the affairs of the company as a whole, but whether they had been delegated total, unsupervised authority (de jure or de facto) over the specific transaction in question.

81. On the third stage of inquiry, the courts in ***Barclays*** **cases** (*supra*) observed that generally there has been reluctance to fashion a special rule of attribution in the context of criminal statutes.[31] This reluctance, the courts noted, stemmed from the emphasis on certainty that attends questions of criminal culpability.[32] Further, where courts had fashioned a special rule, it was done so in the context of statutes whose purpose was narrow and readily determinable.[33] For statutes of a general nature where the purpose was not so easily ascertained, courts have accordingly been slower to derive a special rule of attribution.[34]

82. The ***Barclays*** **cases** (*supra*) concerned section 2 of the Fraud Act 2006, a provision whose purpose could not readily be determined in the abstract. The courts recognised the difficulty inherent in identifying the purpose of so broad a provision, given that its purpose would necessarily vary across the wide range of circumstances to which it could apply.[35] For this reason,

---

[30] ¶ 168 of the Crown Court Decision.
[31] ¶ 81 of the High Court Decision.
[32] ¶ 195 of the Crown Court Decision; ¶ 67 of the High Court Decision.
[33] ¶ 176-177 of the Crown Court Decision.
[34] *Id.*
[35] ¶ 179-182 of the Crown Court Decision.

the courts declined to determine, in a broad, abstract, and acontextual manner, whether section 2 of the Fraud Act 2006 could never permit the derivation of a special rule of attribution.[36] Instead, the inquiry was confined to the particular circumstances of the case, and whether in that context identification of the statutory purpose leads to the implication of a special rule operating outside the envelope of primary rules of attribution and implied delegation.[37] This, the courts believed, was consonant with the approach undertaken by lord Hoffmann in ***Meridian Global*** (*supra*).

(iii) Application to facts

83. Turning to the application of this test to the facts before it, the courts in ***Barclays* cases** (*supra*) first considered the primary rules of attribution. On this basis, it was clear that the concerned persons were not vested with the power to undertake the concerned transaction. As the Crown Court noted:

> *"A consideration of the primary rules of attribution leads inevitably to the conclusion that JV, RJ and CL were not the directing mind and will of Barclays. The constitutional position is as clear as it is narrow: the directing mind and will of Barclays was the Board, subject to express delegation by the Board to a relevant committee. The committees in question were the BFC and the GCC. The BFC delegated the formal approval of the key documentation to Mr Agius and JV, on the basis that the overall parameters had been set by the Board. It follows that the SFO must proceed, as I think it accepts, to the second stage".*[38]

84. On the inquiry pertaining to implied delegation, the courts concluded that the concerned persons did not possess the authority to do the deal. The courts noted that the concerned persons had, at most, authority to conduct negotiations within the framework set by the Board.[39] This, the courts held, could not be equated with authority to do the deal, which in this case would mean the authority to commit Barclays to capital raisings or to agree a secret commission which amounted to an additional fee.[40]

---

[36] ¶ 183 of the Crown Court Decision.
[37] ¶ 184 of the Crown Court Decision.
[38] ¶ 167 of the Crown Court Decision.
[39] ¶ 169-173 of the Crown Court Decision.
[40] *Id.*

Further, since the ASAs were never genuine advisory agreements, and since the individuals concerned had authority only to enter into genuine advisory agreements, they could not, on this footing either, be said to have possessed authority to do the deal.[41]

85. The courts in ***Barclays cases*** (*supra*), in effect, held that the procedures laid down, and the framework within which the concerned persons operated, could not simply be wished away to proclaim on them an authority to do the deal. The following extracts from the High Court's decision very aptly capture the approach that the courts in ***Barclays cases*** (*supra*) had taken on this aspect:

> *"By virtue of what, it may be asked, did JV, CL or RJ have authority not only to negotiate but also to complete and conclude and issue the Subscription Agreements and Prospectuses for CR1 and CR2 as to be finalised, signed and issued? The short answer is: they had no authority. They were not, in the words of Lord Hoffmann, authorised "to do the deal." The relevant powers in that regard had been reserved, if not to the main Board then to the BFC (or perhaps, for CR2, JV and the Chairman jointly). It was they who were the ultimate decision makers. The above-mentioned resolutions demonstrate that. It is also to be noted that there was no evidence that JV, CL and RJ had assumed or been entrusted with control of all the many other aspects of CR1 and CR2 (it being recalled that the Qatari entities were by no means the only subscribers and that there were very many other facets of the fund-raising requiring to be finalised). Furthermore, given the structures specifically adopted, the (uncommunicated) knowledge of JV, as Chief Executive Officer, or CL, as Group Finance Director, cannot for these purposes be imputed to the Board or BFC as a whole.*
>
> *On that basis, derived from the prosecution's own case, those individuals did not with regard to these transactions have "full discretion" to act independently and they were "responsible to another person [viz the BFC] for the manner in which they discharged their duties" (reflecting the words of Lord Reid and Lord Pearson in Tesco v Nattrass). It follows that, by reference to the pleaded particulars on the indictment, they could not be regarded as the directing mind and will for the purpose of performing the functions in question. That in essence, in my view, is the long and the short of it.*
>
> *Sir James protested that that was and is far too narrow an approach. He relied on cases such as El Ajou for the proposition that one has to have*

[41] *Id.*

regard to the realities, to the de facto control. He said that the approach of the judge had in effect focused solely on the "primary rules of attribution" without the necessary wider approach needed to assess who in reality was the directing mind and will.

But this case, as I have already indicated, is very different from El Ajou. In El Ajou, F not only had entire control over the negotiations he also had entire control over the completion of the relevant agreement and payments and yet further, and critically, had been permitted (albeit without a formal resolution) by the board of DLH to exercise such entire control. That being so, it could not assist DLH that it had not known of or authorised the dishonesty of F. It could not assist it because it had delegated entire control of the entirety of the transaction so as to make F the company's directing mind and will. That, however, simply is not the case here. Here, neither the main Board nor, the BFC had conferred such entire control on JV, CL and RJ. To the contrary, they had retained ultimate authority for the finalising and approval of CR1 and CR2 to the Board or BFC (or also, in the case of CR2, to the joint authority of the Chairman and JV). Likewise the case of Bank of India v Morris is to be distinguished: because there too S had been given complete authority and control to permit, negotiate and conclude the transactions in question. Thus in the circumstances of the present case the argument of the SFO that it is irrelevant that neither the Board nor the BFC knew of or authorised the alleged unlawful transactions itself becomes irrelevant. It becomes irrelevant because the alleged individual conspirators were not the directing mind and will of Barclays for the purposes of performing the functions in question.

<u>It simply is not acceptable, in my opinion, for the SFO to regard the various resolutions of the Board and of the BFC as, in effect, mere pieces of paper. They are not: they reflect the level of delegation sanctioned by the appropriate organs of the company. Broad appeals to "the realities" and to the "de facto" position cannot overcome that in this case. This is not a matter of form over substance. Rather, in this case, the form is the substance. That the individuals had some degree of autonomy is not enough. It had to be shown, if criminal culpability was capable of being attributed to Barclays, that they had entire autonomy to do the deal in question; and that is not the case here</u>. [...]"

[Emphasis Supplied]

86. Lastly, the courts rejected the prosecution's submission that section 2 of the Fraud Act 2006 provided for a special rule of attribution. It was the prosecution's submission that the statutory purposes would be thwarted if Barclays could shelter behind the argument that other rules of attribution cannot operate to fix them with criminal liability. Rejecting this

argument, the courts held that the furtherance of the statutory purpose, i.e. prevention and deterrence of fraud in companies, including large companies, does not require the fixing of criminal liability on Barclays in the circumstances of the case before it.[42] Consequently, there was no need to fashion a special rule of attribution.

87. In coming to this decision, a few pertinent facts seemed to influence the Crown Court.[43] Concisely put, they are:

    a. To equate authority to negotiate with authority to do the deal would mean that liability could attach to the company even where the deal was never concluded, and remained liable to unravel at the stage of formal Board or committee approval. A negotiation, without more, carries no binding legal consequence for the company. Hence, logic, policy and principle do not require the carving out of a special rule to inculpate Barclays on account of this type of activity. The only situations in which a special rule has been fashioned in the field of criminal law are cases where the individuals in question have bound the company by their autonomous actions or have taken legally relevant steps as part and parcel of the transactions over which they had control;

    b. There was no basis for saying that the Board or the BFC had failed in their own duties or that the approval process was perfunctory. Thus, the argument that a special rule was needed because, absent one, companies might escape liability by pointing to formal approval steps that could in principle be perfunctory could not be sustained on the facts of the case. In other words, this was not a case where the formal structures were merely rubber-stamping the decisions taken by the concerned persons.

[42] ¶ 187 of the Crown Court Decision; ¶ 131 of the High Court Decision.
[43] ¶ 188 -194 of the Crown Court Decision.

c. The concerned persons deceived the relevant decision makers as to the true nature of the transaction before the relevant decision was taken, concealing that the fee for the alleged advisory services was, in truth, a secret commission connected to the capital raising.

d. The prosecution has failed to prove that the statutory purpose would be 'thwarted '. Thwarted does not simply mean making the case of the prosecution difficult or something along the lines of "criminal liability ought to attach in these circumstances".

88. What emerges from the foregoing is that the courts in ***Barclays cases*** (*supra*) appear to have identified certain circumstances in the facts of the case, which, taken together, demonstrated why attribution ought not to extend to the persons concerned by fashioning of a special rule of attribution.[44] They did not lay down any general or portable rules as to when a special rule of attribution would, or would not, be warranted under section 2 of the Fraud Act 2006.

(iv) Aspects of Divergence

89. The courts in ***Barclays cases*** (*supra*) appear to have diverged from the earlier case law in two respects. *First,* the courts seem to have read the identification doctrine laid down in ***Tesco Supermarkets*** (*supra*) as only envisaging the delegation mode of attribution, and not the status based mode. *Secondly*, the courts also departed from the manner in which Lord Hoffmann, in ***Meridian Global*** (*supra*), approached the question of whether a special rule of attribution ought to be fashioned. Each of these points is considered in turn below.

90. Turning first to the point of divergence from ***Tesco Supermarkets*** (*supra*), the courts in the ***Barclays cases*** (*supra*), despite dealing with very senior executives of Barclays, at no point sought to determine whether their actions could be attributed to the company solely based on their position

[44] ¶ 186 of the Crown Court Decision.

or status. Explicit confirmation of this refusal to invoke the status based route may be found in the courts' reliance on ***Meridian Global*** (*supra*), from which they drew two conclusions: first, that the correct starting point for attribution is not some generalised notion of seniority or status;[45] and second, that the application of the general rule of implied delegation requires more than a merit-based consideration of whether the person concerned occupied a sufficiently responsible position.[46]

91. This focus on authority, according to some commentators, has resulted in the identification doctrine being narrowed further still, from an already narrow conception under ***Tesco Supermarkets*** (*supra*). Whereas, in pre-***Barclays cases*** (*supra*), attribution was possible based on status alone, the position thereafter was that even where status is present, as in the case of senior management, authority must additionally be established.[47]

92. Turning now to the divergence from the approach conceived under ***Meridian Global*** (*supra*) for determining whether a special rule of attribution ought to be fashioned. The Crown Court held that its approach, of confining the inquiry to the facts and circumstances before it, was consonant with that undertaken by Lord Hoffmann.[48] However, on a closer reading of Lord Hoffmann's own reasoning, the question he asked was whether the statutory purpose of the provision in question, considered as such, requires a special rule of attribution. The question asked by the courts in the ***Barclays cases*** (*supra*), by contrast, was whether the statutory purpose of the provision, in the facts and circumstances of the case before them, requires a special rule of attribution to be fashioned.[49]

93. This departure, however, is perhaps best understood as a response to the nature of the provision before the courts. As discussed above, while the purpose of a narrow provision may be readily ascertained, the same

---

[45] ¶ 119 & 174 of the Crown Court Decision.
[46] ¶ 126 of the Crown Court Decision.
[47] ¶ 3.86 Law Commission, *Corporate Criminal Liability: An Options Paper* 43 (2022).
[48] ¶ 183 of the Crown Court Decision.
[49] *Id.*

exercise proves considerably more difficult in respect of a broad provision such as section 2 of the Fraud Act 2006, which is capable of being applied across a wide and varying range of circumstances. Viewed in this light, the courts' approach may be seen as devising a workable mechanism for undertaking the special rule inquiry in precisely those cases where the breadth of the statute renders the identification of a single purpose an unworkable exercise.

94. This detailed examination of the ***Barclays cases*** (*supra*) has been undertaken because of its considerable significance. It marks the first occasion in which English courts grappled with corporate criminal liability under a broad, general offence, rather than a narrow regulatory statute. Understanding how the courts dealt with the issues accordingly offers valuable guidance for the question before us, particularly given the limited body of Indian jurisprudence on this aspect. The significance of ***Barclays cases*** (*supra*) is further borne out by the fact that English law has since undergone material change, albeit through legislative reform. This change, to some extent, can be traced to the decisions in the ***Barclays cases*** (*supra*). Let us very briefly look at the present position under English law.

(d) Developments in law post Barclays

95. In November 2020, the Law Commission of England and Wales was asked to review the law on corporate criminal liability, and it published its options paper on the subject in 2022. The options paper recorded a wide variety of criticism directed at the identification doctrine, both in the form in which it had traditionally applied and in the narrower form it had come to assume in the wake of the ***Barclays cases*** (*supra*),[50] and accordingly set out to examine possible alternatives to it. Three alternative models were considered.[51]

[50] *Supra note* 47 at ¶ 3.63 - 3.85 (pages 39-43).
[51] The scope of the Options Paper was considerably wider. It considered a range of other aspects of corporate criminal liability, including "failure to prevent" offences, liability of directors and senior managers, and sentencing of non-natural persons. Our focus here remains confined to the alternatives discussed to the identification doctrine.

96. One model considered by the options paper was *respondeat superior*, the doctrine which forms the primary basis of corporate criminal liability in the federal courts, and in most state courts, of the United States. Under this doctrine, a company may be held criminally liable for the acts of its employees and agents where the offence is committed within the scope of their employment and is motivated, at least in part, by an intent to benefit the corporation.[52] The company need not have actually gained from the act. It suffices that the act was intended to be favourable to the company's interests, even where the employee's primary motivation was personal gain.[53] The doctrine draws no distinction on the basis of seniority, and applies to employees of any level, provided they were acting broadly within the scope of their role.[54] Consequently, *respondeat superior* makes it considerably easier to convict a company for the acts of its more junior employees than the identification doctrine does.

97. *Respondeat superior* is often described as a species of vicarious liability, though it may equally be argued that it is not vicarious liability at all, but rather an independent mode of attribution, a distinction that, on closer examination, comes close to collapsing.[55] What is significant, however, is that *respondeat superior* is not used in criminal law to attribute liability as between natural persons, since it is difficult to see how the acts of one natural person could simultaneously be regarded as the acts of another.[56]

98. Another model considered by the options paper drew on statutory reforms undertaken in Australia and Canada. The federal criminal codes of both countries have rules for attributing responsibility to corporations, and these rules specifically cover attribution of acts of senior managers. Under the Commonwealth Criminal Code of Australia, liability may attach where a 'high managerial agent' of the corporation engaged in,

[52] *Supra note* 47 at ¶ 5.1 – 5.12 (pages 62-64); Also see *Supra note* 3 at 79-100.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*

authorised, or permitted the relevant conduct.[57] Under the Canadian Criminal Code, liability may similarly attach on the basis of the acts and state of mind of a 'senior officer', defined as a representative who plays an important role in establishing the organisation's policies or in managing a significant aspect of its activities, and, in the case of a body corporate, expressly includes its directors, chief executive officer, and chief financial officer.[58]

99. The last model considered by the options paper was the corporate culture model, which departs altogether from the structure common to the other models of attribution. Rather than asking whose mind and will is to stand for the corporation's, the corporate culture model looks instead for corporate analogues to the fault elements, and asks whether the corporation's own culture, policies, and practices were such as to have encouraged, permitted, or licensed the conduct in question.[59] Such an approach has been adopted in Australia.[60]

100. Having considered each of these models, the options paper rejected both the doctrine of *respondeat superior* and the corporate culture model as a basis for reform in England and Wales. For offences requiring a fault element, it concluded that the choice lay between two options: retaining the identification doctrine as it presently stands, or allowing conduct to be attributed to a corporation where a member of its senior management engaged in, consented to, or connived in the offence.[61] Senior management was defined as any person playing a significant role in managing or organising the whole, or a substantial part, of the organisation's activities.[62] It further considered a variant of this second option, under

[57] *Id* at ¶ 4.7 – 4.11 (pages 46-47).
[58] *Id* at ¶ 4.12 – 4.15 (pages 47-48).
[59] *Id* at ¶ 6.1 – 6.2 (page 73).
[60] *Id* at ¶ 6.3 – 6.9 (page 73-74).
[61] *Id* at ¶ 7.4 -7.6 (pages 84-85).
[62] *Id.*

which the organisation's chief executive officer and chief financial officer would always be treated as members of senior management.[63]

101. The option allowing for attribution via senior management was first implemented through the Economic Crime and Corporate Transparency Act 2023. This Act introduced corporate liability where a senior manager committed an offence within the scope of their actual or apparent authority. The Act was limited in scope to economic crime offences only, and it was acknowledged that wider reform was needed to extend such a route of attribution to all crimes. This was achieved through Section 250 of the Crime and Policing Act 2026, which introduces the same basis for attribution across all offences. Under Section 250, a 'senior manager' is identified not by job title, but by the extent of their managerial influence within the organisation, that is, whether they play a significant role in decisions concerning the whole, or a substantial part, of the body corporate's activities.

102. The changes effected by these two enactments have, on the whole, been welcomed. Some criticism, however, persists.[64] Chief among these is that the identification doctrine, even in its extended form, remains rooted in a strictly individualist conception of corporate fault. In other words, it requires that a single natural person within the company be identified who possessed the necessary *mens rea* before the company itself can be held liable.[65] In the case of larger companies, it may not be possible to locate any single individual who possessed that mental state in full.[66] The relevant knowledge and intent may instead be dispersed across several employees, none of whom individually satisfies the fault element.[67]

---

[63] *Id.*
[64] Jeremy Horder, *Corporate Criminal Liability Under the Economic Crime and Corporate Transparency Act 2023*, 45 Legal Stud. 133 (2025).
[65] Alexander Sarch, *Collective Knowledge and the Limits of the Expanded Identification Doctrine*, 44 Oxford J. Legal Stud. 920 (2024).
[66] *Id.*
[67] *Id.*

103. One further aspect deserves recognition. As Davis LJ observed in the High Court decision in Barclays, if the underlying policy objective is to make corporations easier to prosecute, it falls to the legislature, and not the courts, to bring about that change.[68] As the discussion above shows, the legislatures in the UK seem to be adhering to that advice.[69]

(e) Summary

A summary of our discussion on corporate criminal liability and attribution under English law is as follows:

104. Corporate criminal liability under the English law developed slowly. The first inroads came through liability for breach of duties imposed on corporations by charter or statute, whether by omission or by positive act. The rationale seemed that since a duty was owed by the corporation itself, it alone could be held liable for breach of such duty. Alongside this direct route, a second route developed through vicarious liability, principally to address offences of strict or absolute liability. Vicarious liability, however, had no application where an offence required *mens rea*, since English criminal law did not permit a principal to be fixed with the state of mind of its agent.

105. By the 1950s, it had come to be accepted that a corporation could be held liable even for offences requiring *mens rea*. What remained unclear was the basis on which this was possible. Clarity came only with the House of Lords decision in ***Tesco Supermarkets*** (*supra*), which drew upon its own earlier decision in ***Lennard's Carrying*** (*supra*). The basis established by these two decisions is that certain persons within a company, when they act, do not act merely as its agents, but as the company itself. Their acts are accordingly the company's own acts, and their state of mind is the company's own state of mind.

[68] ¶ 103, ***Serious Fraud Office v. Barclays PLC & Anr***, [2018] EWHC 3055 (QB).
[69] *See* Mark Dsouza, *The Corporate Agent in Criminal Law – An Argument for Comprehensive Identification*, 79 Cambridge L.J. 91, 95 (2020).

106. The question of whose acts should be considered as the company's own, thereby rendering it liable for offences requiring *mens rea*, proved more tricky. In ***Tesco Supermarkets*** (*supra*), the House of Lords envisaged two kinds of persons whose acts should be treated as those of the company. The first were those who, by virtue of their position within the company, could be said to embody it. The second were those to whom power had been delegated, regardless of their formal position, to act on the company's behalf with full discretion and independence. This process of identifying those persons who, when they act, act as the company itself has since come to be known as the identification doctrine

107. Lord Hoffmann, in ***Meridian Global*** (*supra*), offered a different framework for answering this question. He cautioned against looking for a company's 'directing mind and will', or its metaphorical 'brain' in abstraction and instead held that the answer was to be found by applying what he termed the rules of attribution. These rules of attribution, discussed in greater detail at paragraph 57 of this judgment, are three in number. Put simply, the primary rules of attribution look to the company's constitutional documents, and ask whose acts those documents themselves treat as the company's own. The general rules of attribution are the ordinary rules of agency that apply to natural persons, and ask whose acts should, on account of such ordinary principles, count as the company's. The special rules of attribution, finally, look to the particular statutory provision in question, and ask, having regard to its purpose, whose acts the provision intends should count as the company's. Lord Hoffman envisaged the special rules of attribution, not as a default starting point, but as those rules which come into play where the answer yielded by the primary or general rules of attribution would defeat the purpose of the statute in question.

108. A related question is how the identification doctrine and the rules of attribution frameworks differ from one another. Though the two appear to proceed differently, they are, in substance, directed at the same underlying question, i.e., whether the act and state of mind of the

concerned person should be considered as the act and state of mind of the company. The identification doctrine asks whether the person concerned is *acting as an embodiment of the company*. The rules of attribution, by contrast, ask whether the act done by that *person would count as the act of the company*. The difference is one of form and not of substance.

109. However, doubts persisted on how the identification doctrine envisaged under ***Tesco Supermarkets*** (*supra*) and the rules of the attribution framework envisaged by Lord Hoffman in ***Meridian Global*** (*supra*) would operate together. The decisions in the ***Barclays cases*** (*supra*) bring some clarity on this aspect. The courts in the ***Barclays cases*** (*supra*) held that the prevailing test remains that laid down in ***Tesco Supermarkets*** (supra) and only where consideration of the statute creating the offence in question pointed to a different, and perhaps broader, approach that ***Meridian Global*** (*supra*) would come into play. This might appear to sit uneasily with the Crown Court's further finding that there is no "true identification" principle, just a hierarchy of primary, general and special rules derived from ***Meridian Global*** (*supra*), which govern attribution in criminal cases as well. However, the tension is resolved when we understand that the courts did not treat the identification doctrine envisaged in ***Tesco Supermarkets*** (*supra*) as being outside the framework laid down in ***Meridian Global*** (*supra*). Instead, they seem to treat the identification doctrine as envisaged in ***Tesco Supermarkets*** (*supra*) as being covered within the primary and general rules of attribution. Thereby treating ***Meridian Global's*** (*supra*) true contribution as allowing for special rules to be fashioned.

110. The court in ***Barclays cases*** (*supra*) recognised that the directing mind and will of a company need not vest in the same person for every transaction, and that the correct approach is to ask, for the transaction in question, whose acts are to count as the company's own. How this question was to be answered, however, differed at each stage of the

inquiry. The ***Barclays cases*** (*supra*) envisaged each of the stages in the following manner:

a. At the primary stage, the courts asked in whom the company's constitutional documents vested the relevant power, or, where delegation was permitted, to whom such power had in fact been delegated;

b. At the general stage, the courts asked whether implied delegation had conferred on the person concerned the authority to act on the company's behalf in respect of the transaction in question; and

c. At the special stage, the courts considered whether the statutory purpose, on the facts and circumstances of the case, permitted a special rule of attribution to be fashioned.

Applying this sequential test to the facts, the courts in ***Barclays cases*** (*supra*) held that the actions of the persons concerned could not be attributed to the company.

111. Two aspects of the approach taken by the courts in ***Barclays cases*** (*supra*) are worth noting, as they mark a departure from the position under ***Tesco Supermarkets*** (*supra*) and ***Meridian Global*** (*supra*) respectively. First, status alone could no longer allow for attribution, i.e., even the acts of senior officials required proof of authority, thereby marking a departure from the way the ruling in ***Tesco Supermarkets*** (*supra*) was applied in practice. Second, in considering whether a special rule of attribution ought to be fashioned, the courts asked whether the statutory purpose of the provision demanded such a rule in the facts and circumstances of the case before them, rather than, as Lord Hoffmann had asked in ***Meridian Global*** (*supra*), whether the statutory purpose demanded it in the abstract.

112. To the extent that the ***Barclays cases*** (*supra*) further narrowed the scope of attribution by discarding the status based route, the legislature responded by creating statutory provisions extending attribution to senior managers,

without requiring proof of the kind of authority ***Barclays cases*** (*supra*) had insisted upon. This route was first introduced for economic crime offences alone. However, the Crime and Policing Act 2026 has extended the same to all criminal offences.

113. Lest any confusion arise, it must be understood that the framework discussed above, comprising the identification doctrine and the rules of attribution, does not govern every criminal offence in which a corporation may be implicated under English law. As we had alluded to, where an offence requires proof of conduct alone, and no *mens rea*, simpler routes to liability are generally available. In some cases, the company alone can properly be said to have done the act in question, such that no attribution is required at all. This may be so either because the offence imposes a duty on the company directly, or because the conduct in question can be conceived as having been done by the company itself.[70] Where the act admits of no such direct characterisation, but neither does the offence require *mens rea*, English courts have generally been willing to read in a presumption of vicarious liability, particularly for offences of strict or absolute liability.[71] It is only where an offence has been framed with natural persons in mind, and requires proof of *mens rea*, that the identification doctrine seems to come into play.

III. <u>CORPORATE CRIMINAL LIABILITY AND THE ATTRIBUTION QUESTION: POSITION IN INDIA</u>

114. The core issues surrounding corporate criminal liability in India appear to be twofold: *first*, whether a corporation could be prosecuted for an offence where mandatory imprisonment has been prescribed; and *secondly*, whether a corporation could be held liable for offences involving an element of *mens rea*. The traditional view, as held by various High Courts for a considerable period, answered both propositions in the negative.

[70] *Supra note* 47 at ¶ 2.28 – 2.29 (pages 18-19).
[71] *Id.*

115. It appears that the reasoning underlying this traditional view was rooted in the fact that a corporation is a juristic person and not a natural person. Accordingly, it was held that since a corporation does not possess a physical body, it cannot be imprisoned, and consequently, provisions prescribing mandatory imprisonment were inapplicable.[72] Similarly, since a juristic person cannot possess a state of mind, it cannot possess *mens rea* and thereby could not be held liable for offences requiring *mens rea*.[73] It may, however, be noted that on both these aspects, certain High Courts had taken a contrary view.[74]

(a) <u>Issue of Mandatory Imprisonment</u>

116. Let us first briefly deal with the issue of mandatory imprisonment, as the position on that aspect is now fairly settled. This court addressed the question directly in ***M.V. Javali v. Mahajan Borewell & Co. & Anr***, reported in **(1997) 8 SCC 72**. The provision under consideration there was from the Income Tax Act, which provided that a company could be held liable for the offence in question, yet simultaneously prescribed a mandatory punishment of both imprisonment and fine. This gave rise to an anomalous situation as a juristic person, incapable of being imprisoned, could nonetheless be found guilty of an offence for which imprisonment was mandatory. The Court held that this anomaly could only be resolved through a proper interpretation of the section, and that the only harmonious construction available was one under which the company, though liable to be prosecuted, would be made liable to a fine alone.[75] The

---

[72] *See* ***Kusum Products Ltd v. S.K Sinha***, (1980) 126 ITR 804; ***Adding Machines India (Pvt) Ltd. v. The State***, (1987) 167 ITR 171; ¶ 100, 104-105, ***D.C. Goel & Ors v. B.L. Verma & Ors***, (1974) 93 ITR 63; ***A.K Khosla & Ors v. T.S.Venkatesan***, 1991 SCC OnLine Cal 225; ¶ 64 ***Shree Singhvi Brothers & Ors v. Union of India & Ors***, (1991) 187 ITR 219; ¶ 11, ***S.M. Badsha v. Income Tax Officer***, (1987) 16 ITR 332; ***P.V Pai v. R.L Rinawma***, (1993) 200 ITR 717.

[73] *See* ***Sunil Chandra Banerjee v. Krishna Chandra Nath***, 1948 SCC OnLine Cal 149; ***Kusum Products Ltd v. S.K Sinha***, (1980) 126 ITR 804; ***A.K Khosla & Ors v. T.S.Venkatesan***, 1991 SCC OnLine Cal 225.

[74] On the issue of Mens rea, see ***State of Maharashtra v. Syndicate Transport Co. (P) Ltd.***, 1963 SCC OnLine Bom 57; ***A.D. Jayaveerapandia Nadar & Co. v. Income-Tax Officer***, (1975) 101 ITR 390; and ***Esso Standard Inc v. Udharam Bhagwandas Japanwalla***, 1973 SCC OnLine Bom 56. On the issue of mandatory imprisonment, *see* ***ITO v. Jyothi Coconut Merchants***, [1991] 187 ITR 246; ***MCD v. J.B Bottling Co. (P) Ltd.***, 1975 SCC OnLine Del 47; ***Oswal Vanaspati & Allied Industries v. State of U.P.***, (1992) 75 Comp Cas 770.

[75] *See* ¶ **7**-8.

upshot of the Court's ruling was that where a statute prescribes both fine and imprisonment for an offence, companies could be prosecuted for such offences but only a fine would be imposed on them.

117. However, in ***Assistant Commissioner, Assessment-II, Bangalore & Ors v. Velliappa Textiles Ltd. & Anr***, reported in **(2003) 11 SCC 405**, a 3-Judge Bench of this Court came to a different conclusion on the issue of whether prosecution is sustainable against a company for offences where a sentence of imprisonment is mandatory. Here too, the Court was dealing with provisions of the Income Tax Act which prescribed a mandatory punishment of both imprisonment and fine. Srikrishna J. and Rajendra Babu J. (as he then was), in the majority on this issue, answered in the negative. Pithily put, the reasoning adopted by the majority was as follows:

a. *First*, criminal statutes have to be strictly construed and that, where the legislature has not conferred any discretion in the matter of sentencing and has prescribed a mandatory punishment, it is not open to the Court to read down that punishment to a fine alone, for that would amount to a virtual rewriting of the statute[76];

b. *Secondly*, the situation was not one of interpretational exercise but one that calls for rectification of an error in the drafting of the statute concerned. Thus, if the legislature has left a lacuna, it was not open to the Court to supply the omission based on some presumed legislative intention[77].

Mathur, J., however, dissented on this issue, holding that the mere fact that a company cannot be sent to jail cannot lead to an inference that it should not be prosecuted at all.[78] An appropriate fine, itself one of the

---

[76] *See* ¶ 39-49 & 57-58 .
[77] *Id*.
[78] *See* ¶ 14-22.

punishments provided under the relevant sections, could be imposed instead.

118. The issue was finally resolved by this Court's ruling in ***Standard Chartered Bank*** (*supra*)**,** wherein, by a majority of 3:2, it was held that there is no immunity to the companies from prosecution merely because the prosecution is in respect of offences for which the punishment prescribed is mandatory imprisonment (and fine). The decision in ***Velliappa Textiles*** *(supra)* on this aspect was accordingly held to be overruled. It needs to be noted that the Court recognised that where imprisonment alone is prescribed, a company cannot be prosecuted for that offence and thus the ruling was confined to provisions prescribing a mandatory punishment of both imprisonment and fine.

119. The crux of the majority's reasoning was: (i) all statutes, including penal statutes, ought to be fairly construed according to the legislative intent as expressed in the enactment; (ii) reading the provision as granting companies blanket immunity wherever imprisonment is mandatory would produce the anomalous result that companies remain liable for lesser offences, while escaping liability altogether for graver ones- a result Parliament could not have intended; and (iii) since imprisonment cannot possibly be imposed on a company and the law does not compel the impossible, a judicial discretion to impose fine alone has to be read into such provisions, but only insofar as the offender is a juristic person. This reasoning is reflected in the following paragraphs from Justice K.G. Balakrishnan's (as he then was) opinion:

> *"29. The contention of the appellants is that when an offence is punishable with imprisonment and fine, the court is not left with any discretion to impose any one of them and consequently the company being a juristic person cannot be prosecuted for the offence for which custodial sentence is the mandatory punishment. <u>If the custodial sentence is the only punishment prescribed for the offence, this plea is acceptable, but when the custodial sentence and fine are the prescribed mode of punishment, the court can impose the sentence of fine on a company which is found guilty as the sentence of imprisonment is impossible to be carried out. It is an acceptable legal maxim that law</u>*

does not compel a man to do that which cannot possibly be performed (impotentia excusat legem). This principle can be found in Bennion's Statutory Interpretation, 4th Edn. at p. 969. "All civilized systems of law import the principle that lex non cogit ad impossibilia…." As Patterson, J. said "the law compels no impossibility". Bennion discussing about legal impossibility at p. 970 states that: "If an enactment requires what is legally impossible it will be presumed that Parliament intended it to be modified so as to remove the impossibility element." This Court applied the doctrine of impossibility of performance (lex non cogit ad impossibilia) in numerous cases (State of Rajasthan v. Shamsher Singh and Special Reference No. 1 of 2002, In re)

30. As the company cannot be sentenced to imprisonment, the court has to resort to punishment of imposition of fine which is also a prescribed punishment. As per the scheme of various enactments and also the Penal Code, 1860, mandatory custodial sentence is prescribed for graver offences. If the appellants' plea is accepted, no company or corporate bodies could be prosecuted for the graver offences whereas they could be prosecuted for minor offences as the sentence prescribed therein is custodial sentence or fine. We do not think that the intention of the legislature is to give complete immunity from prosecution to the corporate bodies for these grave offences. The offences mentioned under Section 56(1) of the FERA Act, 1973, namely, those under Section 13; clause (a) of sub-section (1) of Section 18; Section 18-A; clause (a) of sub-section (1) of Section 19; sub-section (2) of Section 44, for which the minimum sentence of six months' imprisonment is prescribed, are serious offences and if committed would have serious financial consequences affecting the economy of the country. All those offences could be committed by company or corporate bodies. We do not think that the legislative intent is not to prosecute the companies for these serious offences, if these offences involve the amount or value of more than Rs one lakh, and that they could be prosecuted only when the offences involve an amount or value less than Rs one lakh.

31. As the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could be enforced against the company. Such a discretion is to be read into the section so far as the juristic person is concerned. Of course, the court cannot exercise the same discretion as regards a natural person. Then the court would not be passing the sentence in accordance with law. As regards company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way. We do not think that there is a blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of *mandatory imprisonment. The corporate bodies, such as a firm or company undertake a series of activities that affect the life, liberty and property of the citizens. Large-scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable economy."*

[Emphasis Supplied]

On the other hand, Srikrishna J.'s dissent (for himself and Hegde J.) carried forward the position the majority held in ***Velliappa Textiles*** *(supra)*, i.e., the problem was one of legislative drafting error rather than genuine ambiguity, and hence was curable only by Parliament and not by judicial construction.[79]

120. Further, this Court in ***Standard Chartered Bank*** (*supra*) affirmed that: (i) the generally accepted modern rule permits a corporation to be indicted for criminal offences save those it is incapable of committing by reason that such offences require personal malicious intent[80], and (ii) the word "person" in a penal statute is ordinarily construed to include a corporation even where not expressly defined to do so.[81] However, the Court expressly declined to express any opinion on whether a corporation could be held liable for offences requiring *mens rea*, holding that the question did not arise for consideration in the reference before it.[82]

(b) Issue of Mens Rea

121. While the question of whether a corporation could be prosecuted for offences carrying mandatory imprisonment reached a closure, the question of whether a corporation could be held liable for offences requiring *mens rea* remained open. This was despite the fact that this Court, as far back as 1953, had in passing taken note of developments in English

[79] *See* ¶ 58-79.
[80] *See* ¶ 6.
[81] *See* ¶ 7.
[82] *See* ¶ 8.

law recognising that a company could be convicted even for an offence requiring an act of will or a state of mind.[83]

122. As remarked above, most High Courts had followed the traditional view that a corporation couldn't be held liable for offences which required proof of *mens rea*. However, there are some High Court decisions which held to the contrary. It would be trite to briefly examine the approach that was envisaged in these cases. In the ***State of Maharashtra v. Syndicate Transport Co. (P) Ltd.***, reported in **1963 SCC OnLine Bom 57**, the Bombay High Court was directly concerned with the liability of a corporate body for criminal offences involving *mens rea*. After examining the position under English law, the Court made the following observations:

> *"23. In our country also, corporate bodies were initially indictable for minor breaches of rules or bye-laws or for offences involving petty fines only. In recent times, the ideas of corporate activities have taken root and several legislations permitting the formation of corporate bodies have been passed. Numerous corporate bodies have come into existence. These corporate bodies include various public and private limited companies also. These corporate bodies necessarily act through the human agency of their directors or officers and authorised agents. They reap all the advantages flowing from the acts of their directors, servants or authorized agents and there seems to be no reason to exempt them from liability for crimes committed by their agents or servants while purporting to act for or on behalf of the corporate bodies. The ordinary citizen, is now very much exposed to the activities of persons acting, in the name of corporate bodies, to his detriment[...]*
>
> *24. In my view, therefore, "the scope within which criminal proceedings can be brought against institutions which has become so prominent a feature of everyday affairs" ought to be widened so as to make corporate bodies indictable for offences flowing from the acts or omissions of their human agents. <u>Ordinarily, a corporate body like a company acts through its managing director or board of directors or authorized agents or servants and the criminal act or omission of an agent including his state of mind, intention, knowledge or belief ought to be treated as the act or omission including the state of mind, intention, knowledge or belief of the company. I do not mean or intend to suggest that in every case where an agent of a limited company acting in its business commits a crime, the company is automatically to be held criminally responsible. As adumbrated, a company cannot be indictable for offences like</u>*

[83] ***Motipur Zamindari Co. Ltd. v. State of Bihar***, (1953) 1 SCC 756.

bigamy, perjury, rape etc. which can only be committed by a human individual or for offences punishable with imprisonment or corporal punishment. Barring these exceptions, a corporate body ought to be indictable : for criminal acts or omissions of its directors, or authorized 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. 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. Each case will have necessarily to depend on its own facts which will have to be considered by the Magistrate or Judge before deciding whether to proceed against a corporate body or not."

[Emphasis Supplied]

123. On facts, the Bombay High Court ultimately discharged the Company for reasons which do not concern our discussion here. The above observations, however, remain instructive for two reasons. *First*, the Court accepted, as a matter of principle, that a corporate body can, and ought to, be held liable for offences requiring *mens rea*. This conclusion was supported by the Court's recognition that there exist circumstances in which the criminal act of an agent, including his state of mind, ought to be treated as the act and the state of mind of the company itself. *Second*, and more significantly, the Court went on to lay down the conditions governing when such attribution of acts and state of mind of the agent to the company would take place. As a threshold matter, the agent must have acted, or purported to act, under the authority of the corporate body or in pursuance of its aims and objects. Once this threshold is met, whether the acts and states of mind are in fact attributable to the company is a further question to be answered on a case-to-case basis, having regard to the nature of the offence, the relative position of the officer or agent, and other facts capable of showing that the corporate body itself meant or intended the act.

124. In ***A.D. Jayaveerapandia Nadar & Co. v. Income-Tax Officer***, reported in **(1975) 101 ITR 390,** the Madras High Court was dealing with a case against a partnership firm and individual partners of the said Firm for the offence of making a false verification. They were accused of offences under Section 277 of the Income Tax Act, 1961 r/w Section 34 of the IPC. The Madras High Court, after discussing certain important cases, both under English and Indian Law, on the issue of corporate criminal liability, made the following pertinent observations:

> *"75. The law on the subject can be summarised as follows:*
>
> > *A corporation could not be subjected to bodily punishment. It could, however, be fined; and to this day fine remains the only mode of punishment applicable to a corporation. Since fine only is the type of punishment appropriate to a corporation, if a crime is not punishable with fine, a corporation cannot be convicted of it. The acts of the organs of the corporation were attributed to the corporation and treated for legal purposes as though they were acts of the corporation itself. However, when will an act or mental strain be imputed to a company as its own, is a question that has to be considered by a court, depending upon the facts and circumstances of each case. A company can commit crimes only by its agents, who must themselves be responsible for the crime, and it is a question in each case whether the act of the agent, including his state of mind, intention, knowledge or belief can be imputed to the corporation. It depends upon the nature of the charge, the position of the officer or agent relative to the corporation and the other relevant facts and circumstances of the case.*
>
> *76. A company cannot be guilty of any criminal offence which, by their very nature, can only be committed by natural persons (such as bigamy), nor of those which cannot be committed vicariously (such as perjury, bigamy, rape, homicide, etc.). A company cannot be indicted for a crime where the only punishment is death or imprisonment. A company may be guilty both of statutory and common law offences (of course in exceptional cases in respect of common law offences), even though the latter involves mens rea. A corporation can be indicted for contempt and libel.*
>
> *77. Wherever a duty is imposed by statute in such a way that a breach of the duty amounts to a disobedience of the law, then if there is nothing in the statute either expressly or impliedly to the contrary, a breach of*

the statute is an offence for which a corporation will be indicted, whether or not the statute refers in terms to corporations.

78. A statute which creates a criminal offence may expressly or by necessary implication define the particular state of mind which is an element of offence or it may be silent on this point. It is of utmost importance to the protection of the liberty of the subject and of the corporation or company to which such state of mind is imputed by fiction that a court shall always bear in mind that unless a statute either clearly or by necessary implication rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless that person has a guilty mind. This principle will apply to the corporations also.

***79.** Applying those principles to the facts of this case and on the finding that accused 2 had submitted a false return knowing or believing such return to be false, accused 1-company will also be liable for the offence as such knowledge or belief can be imputed to accused 1-company. In the result, the conviction of accused 1 under charge No. 1 for an offence under section 277 of the Income-tax Act and that of accused 2 under charges Nos. 2 and 3 for offences punishable under section 277 of the Income-tax Act read with section 34, Penal Code, 1860, are confirmed,[...]."*

[Emphasis Supplied]

125. The following principles emerge from the Court's reasoning. *First*, wherever a statute imposes a duty in such a manner that its breach amounts to disobedience of the law, the breach is an offence for which a corporation can be indicted. This holds true whether or not the statute explicitly refers to corporations, provided there is nothing to the contrary stated in the statute. Consequently, a corporation may be guilty of an offence even where *mens rea* is an ingredient of that offence. *Second*, unless a statute, expressly or by necessary implication, rules out *mens rea* as a constituent of the offence, a corporation cannot be held guilty of that offence without proof of a guilty mind. *Third*, where *mens rea* is an ingredient of the offence, criminal liability will attach only where the act and state of mind of an agent or employee can be imputed to the corporation as its own. Whether this is so is a question to be determined on the facts of each case, having regard to the nature of the charge, the relative position of the officer or agent, and the other relevant facts and

circumstances. Applying these principles, the Court attributed the act of the managing partner knowingly submitting a false return to the firm and accordingly held the firm liable under Section 277 of the Income Tax Act, 1961 read with Section 34 of the IPC.

126. A common thread runs through the decisions in ***Syndicate Transport*** (*supra*) and ***A.D. Jayaveerapandia*** (*supra*). Both Courts envisaged scenarios in which the act and state of mind of an agent could be attributed to the company, and in such scenarios, held that the company could be made liable even for offences requiring *mens rea*. Neither Court, however, laid down any fixed test for when such attribution would occur. Instead, both left the question to be determined on a case-to-case basis, depending on the facts and circumstances of the cases and a variety of other factors.

127. The decision of the Bombay High Court in ***Esso Standard Inc. v. Udharam Bhagwandas Japanwalla***, reported in **1973 SCC OnLine Bom 56**, arose out of an application to quash a complaint of cheating instituted against a company and four of its officers. While dealing with the question of quashing, the Court also addressed the issue of whether a corporation could be held guilty of offences requiring proof of *mens rea*. It looked into the decision in ***Tesco Supermarkets*** (*supra*) and concluded that a new method had been developed to hold companies liable for offences requiring *mens rea*, namely, one which attributes to the company the mental state of those who could be termed its directing mind and will.

128. On the question of how such a directing mind and will was to be identified, the Bombay High Court was explicitly against the flexible, case-to-case approach suggested in ***Syndicate Transport*** (*supra*) and, later, in ***A.D. Jayaveerapandia*** (*supra*). It regarded that such a formulation ignored the constitution of corporate bodies under the memorandum of association and articles of association. Instead, it appears to us that the Court envisaged that attribution could occur either where the officer concerned had acted within the limits of authority conferred by the company, or where the company's intention had been expressed in the

manner required under its constitutional documents. Applying this test to the complaint before it, the Court found that the averments disclosed neither such authority nor the company's intention as traceable through its memorandum or articles of association. Thus, no basis for attribution could be made out, and accordingly the complaint was quashed against the company.

129. While the High Courts were dealing with the issue, it appears that, until very recently, this Court never got an opportunity to explicitly deal with the question of whether corporations could possess *mens rea*. A peripheral reference to the issue comes through this Court's judgment in ***Kalpnath Rai v. State,*** reported in **(1997) 8 SCC 732,** where one of the accused was a company which had been convicted under Section 3(4) of the Terrorist and Disruptive Activities (Prevention) Act, 1987, for harbouring a terrorist in a hotel. Section 3(4) was an offence which the Court held required proof of *mens rea*. The Court thereby set aside the conviction of the Company on the ground that, being a juristic person, it could not itself have *mens rea*. It noted that companies are, under several penal statutes, deemed offenders on the strength of acts committed by persons responsible for their management or affairs, but observed that no such provision existed in TADA. It appears to us, however, that this Court in ***Kalpnath Rai*** (*supra*) was not addressed on the developments surrounding the issue of attributing *mens rea* to corporations dehors such statutory deeming provisions. A more serious and detailed consideration of the question appears in ***Velliappa Textiles*** (*supra*).

130. This Court in ***Velliappa Textiles*** (*supra*) considered whether a corporation could possess *mens rea*. Although the decision was subsequently overruled in ***Standard Chartered Bank*** (*supra*), the reversal was confined to the question of mandatory imprisonment. Indeed, this Court in ***Standard Chartered Bank*** (*supra*), as already noted, categorically stated that the *mens rea* issue was beyond the scope of the reference before it. In ***Velliappa Textiles*** (*supra*), two of the three learned Judges accepted that a company

could be made liable for offences which require proof of *mens rea*. Mathur J. surveyed the position under English law and other jurisdictions, all of which clearly indicated that companies could be held liable even for offences which require *mens rea*.[84] Srikrishna J., for his part, held that judicial thinking across the world was that the *mens rea* of the person in charge of the affairs of the corporation could be extrapolated to the corporation, thereby enabling even an artificial person to be prosecuted for such offences.[85] He expressed his agreement with the view taken by Mathur J. on this aspect. Rajendra Babu J., however, disagreed with both Mathur J. and Srikrishna J. on this question, and held that companies could not be made liable for offences requiring proof of *mens rea*.[86] The issue once again came up for consideration before this Court in ***Iridium India*** (*supra*).

131. In ***Iridium India*** (*supra*), the appellant had filed a criminal complaint against Motorola alleging cheating under Section 420 read with Section 120B of the IPC. The Bombay High Court quashed the complaint. One of the grounds on which it did so was that Motorola, being a juridical person, could not possess the intention to deceive, i.e., *mens rea* necessary for the offence of cheating. In the High Court's view, only a natural person was capable of possessing the requisite guilty mind. According to the High Court, the same reasoning would also apply in respect of the offence of conspiracy.

132. It was in this setting that this Court in ***Iridium India*** (*supra*) was called upon to decide whether a company could be held liable at all for an offence requiring *mens rea*. Had the answer been in the negative, the High Court's approach would have stood vindicated. This Court, however, held that virtually across every jurisdiction governed by the rule of law, companies and corporate houses could no longer claim immunity from criminal prosecution on the ground that they were incapable of possessing the

[84] *See* ¶ 10-13.
[85] *See* ¶ 28.
[86] *See* ¶ 54-56.

necessary *mens rea*.[87] Having examined the position in the United States and in England, the Court concluded that the legal position in both jurisdictions had crystallised to leave no doubt that a corporation would be liable for crimes of intent. On this basis, this Court held that the High Court's conclusion that the respondent could not have the necessary *mens rea* was clearly erroneous.[88]

133. The discussion thus far makes clear that a corporation could be prosecuted for an offence, notwithstanding that the offence carried a mandatory sentence of imprisonment or that it required proof of *mens rea*. Consequently, it appears that a corporation cannot be prosecuted only where the offence was punishable with imprisonment alone or where the offence, by its nature, required personal malicious intent, such that it was incapable of commission by a corporation at all.

134. However, it is apparent that the question before this Court in ***Iridium India*** (*supra*) was confined to whether a company could, at all, possess *mens rea*. The question of how, or through whom, such *mens rea* is to be attributed to a company did not arise for consideration. In other words, the second question, i.e., the basis on which *mens rea* could be attributed to a corporation, did not arise for consideration and remained unaddressed.

135. In ***Syndicate Transport*** (*supra*), ***A.D. Jayaveerapandia*** (*supra*), and ***Esso Standard*** (*supra*), the High Courts had not confined themselves to the question of whether a corporation could possess *mens rea*, but had also gone on to consider the basis on which such *mens rea* could be attributed to a corporation. Certain other, more recent decisions of the High Courts have likewise engaged extensively with this question.[89] However, this Court is yet to squarely address this issue. Further, it appears that this Court, as well as certain High Courts, while engaging with corporate *mens rea* in the course of proceedings that did not directly concern the issue,

[87] *See* ¶ 55-63.
[88] *See* ¶ 64-66.
[89] *See*, ***R.S. Sodhi & Anr v. Partha Pratim Saikia***, 2009 SCC OnLine Gau 548; ***Samsung India Electronics Pvt ltd v. State of Assam***, 2012 SCC OnLine Gau 270.

have proceeded on the assumption that ***Iridium India*** (*supra*) had also laid down the basis for attributing *mens rea* to a corporation.[90] This assumption appears to rest on the following observations made by this Court in ***Iridium India*** (*supra*) :

> *"**63.** From the above it becomes evident that a corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring mens rea. <u>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. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons.</u> The position of law on this issue in Canada is almost the same. Mens rea is attributed to corporations on the principle of "alter ego" of the company."*

[Emphasis Supplied]

136. In our considered view, this passage is properly read as an extension of the Court's discussion of the position under English law, rather than as an independent pronouncement on how *mens rea* is to be attributed to a corporation under Indian law. In any event, and as already noted above, this Court in ***Iridium India*** (*supra*) was never concerned with the "how" question, i.e. the second question, but only with the "whether" question, i.e., the first question. Therefore, on this issue we find ourselves looking at an empty vessel, yet to be filled.

(c)<u>How do corporates possess mens rea under Indian Law</u>

137. The discussion above shows that this Court relied upon practical considerations and prevailing trends in judicial thinking across the world to hold that corporations could possess *mens rea*, and could accordingly be held liable for offences requiring proof of such *mens rea*. What remains is to explain how a corporation could be said to possess such *mens rea* in the first place. It is the answer to this question that supplies the theoretical

---

[90] *See* ***Religare Finvest Limited v. State of NCT of Delhi and Another***, (2024) 1 SCC 797; ¶37-41 ***Sunil Bharti Mittal v. Central Bureau of Investigation***, (2015) 4 SCC 609; ¶16.3, ***Ashok kumaran & Ors v. State of Kerala and Another***, 2023 SCC OnLine Ker 5146.

foundation for corporate *mens rea*. Now, when discussing how a corporation can possess *mens rea*, the inquiry is invariably one of how the *mens rea* of a natural person is to be attributed to a corporation. In answering this question, we also find the answers to further connected questions such as: (i) what is the kind of liability that such attribution imposes on the corporation, and (ii) whose state of mind is to be attributed to the corporation and in what circumstances.

138. The next question that arises is what method has to be adopted to attribute the *mens rea* of a natural person to a corporation. At the outset, it is to be noted that in several jurisdictions, the penal codes guide on when and how attribution is to occur. As already noted above, the penal codes of Canada and Australia, amongst others, provide such answers.[91] No comparable guidance exists in the IPC nor the recently enacted Bharatiya Nyaya Sanhita, 2023.

139. In this context, we may look to the English approach to guide us. The American approach, developed through the doctrine of *respondeat superior*, bears a close resemblance to the doctrine of vicarious liability. The position under Indian law, however, is well settled that the ordinary rule in criminal law runs against vicarious liability, i.e., no person is to be held criminally liable for the act of another.[92] This rule admits exception only where a statute specifically creates a legal fiction imposing such liability. No such difficulty attends the approach taken under English law, since it proceeds on the footing that the act and state of mind in question are those of the corporation itself. Further, the decision in ***Meridian Global*** (*supra*) has attained the status of a *locus classicus* on this aspect and has been

---

[91] *See* Guy Stessens, *Corporate Criminal Liability: A Comparative Perspective*, 43 Int'l & Comp. L.Q. 493 (1994).

[92] ¶9 ***Sham Sunder & Ors v. State of Haryana***, (1989) 4 SCC 630; ¶ 32 ***R Kalyani v. Janak C. Mehta***, (2009) 1 SCC 516; ¶44-45 ***Sunil Bharti Mittal v. Central Bureau of Investigation***, (2015) 4 SCC 609; ¶18 ***Aparna A. Shah v. Sheth Developers Private Limited***, (2013) 8 SCC 71; ¶16, 19-20 ***S.K Alagh v. State of Uttar Pradesh & Ors***, (2008) 5 SCC 662; ¶13 ***Maksud Saiyed v. State of Gujarat & Ors***, (2008) 5 SCC 668.

followed across a range of common law jurisdictions as the basis for attribution.

(i) <u>Attribution Framework</u>

140. Technically speaking, a corporation has no knowledge or intention of its own, being no more than a legal abstraction. Yet the converse is equally true, as it is difficult, if not impossible, to conceive of a corporation as existing and functioning in the commercial world without any knowledge or intention whatsoever. It is to balance these two seemingly incompatible positions that a middle ground has been reached: that of attributing to the corporation the knowledge and intention of its agents. However, how can such attribution occur, i.e., how can the state of mind of a natural person become the state of mind of the corporation?

141. The English law approach, with which we are in agreement with, answers this question in a simple manner. It holds that there are certain situations in which a natural person, in doing a particular act, is to be regarded as acting as the corporation itself, or, put another way, there are certain situations in which the act of the natural person is to be regarded as the act of the corporation itself. Seen either way, what is involved is the same exercise: equating the natural person, or the natural person's act, with the corporation, such that the act and state of mind of the natural person in doing that act are attributed to the corporation. However, as our discussion of English law shows, considerable difficulty arises in developing a framework capable of answering when such attribution is to be permitted. It is to develop such a framework in the Indian context that we now turn.

142. Before setting out the framework itself, it is necessary to say a brief word on terminology. Our discussion of English law above reveals a certain multiplicity of terms on this subject, whether described as the "directing mind and will", the "alter ego", the "identification doctrine", or the "rules of attribution". In our considered view, this multiplicity of terms causes

needless confusion. In substance, each of these expressions either describes the person whose act and state of mind may be treated as that of the corporation, or constitutes a doctrine directed at identifying such a person. We therefore consider it preferable, rather than encumber the framework with such terminology, to develop it around a single, simple question: If X, a natural person, does an act while acting for a corporation, in what circumstances is X's act, and the state of mind accompanying it, to be treated as the corporation's own?

143. To answer this question, the sequential, hierarchical approach adopted in ***Barclays cases*** (*supra*) finds favour with us. Thus, the inquiry under Indian law will also proceed through three stages, movement to the next stage occurring only where the preceding stage fails to establish that X's act, and the state of mind accompanying it, can be treated as that of the corporation. The scope of each stage of this inquiry, broadly speaking, mirrors that of each rule of attribution identified in ***Meridian Global*** (*supra*).

144. The first stage of this inquiry is the narrowest of the three in scope. This is because it primarily involves examining the constitutional documents of the corporation, i.e., the memorandum and articles of association, to determine in whom they vest the power to do or undertake the act in question. This stage is not, however, confined to what the constitutional documents expressly provide. It also extends to certain rules which, though not found in the constitutional documents, are implied by company law itself, and which likewise identify whose doing of an act is to be treated as the act of the corporation. Applied to the case of X, the inquiry at this stage is thus: whether the constitutional documents vest X with the power to do the act in question, or whether there exists a rule implied by company law under which X's doing of the act is to be treated as the corporation acting itself. Where either is answered in the affirmative, X's state of mind in doing the act is treated as that of the corporation.

145. This stage, however, will rarely furnish an answer on its own. As Lord Hoffmann himself remarked in ***Meridian Global*** (*supra*), it is not always possible for every decision and action of a company to be traced to what is stated in its constitutional documents. Consider, for instance, a situation where every act of the company required a board resolution before it could be undertaken. Where the constitutional documents and the rules implied by company law are silent as to X, it becomes necessary to ask whether the power to do the act was nonetheless delegated to X. It is here that the general rules of agency step in to supplement the first stage, and the second stage of the inquiry requires an examination on these lines.

146. The second stage of inquiry proceeds on the footing that the question posed at the first stage, namely, in whom the corporation vests the power to do the act in question, is not necessarily confined to what the constitutional documents provide. In most cases, we envisage this stage of the inquiry as proceeding along the lines illustrated in ***Tesco Supermarkets*** (*supra*) and ***Barclays cases*** (*supra*) i.e., examining whether the power to do the act in question has been delegated, whether expressly or impliedly, to X. Whether the delegation is express or implied, the same questions arise for consideration at this stage: whether such delegation to X was permissible; and what was the scope of such delegation.

147. Answering these questions becomes important for two reasons. First, if the delegation was itself impermissible, it could not be said that the power to do the act in question had validly vested in X. Second, even where delegation to do an act was permissible, if X was left with no discretion or independence in deciding how the act was to be done, it cannot again be said that the power to do that act had vested in X. To illustrate, if the board had delegated to X the power to sign the documents in a transaction, but had already itself decided all the material terms of that transaction, it cannot plausibly be argued that the power to conclude the transaction vested in X. What we seek to convey is that, to vest the power to do an act in X, delegation must be along the lines indicated in the speeches in ***Tesco***

Supermarkets (*supra*) i.e., delegation accompanied by discretion and independence in the doing of that act. Absent such discretion and independence, the delegation will not be regarded as vesting the power to do the act in X, and X's act, and the state of mind accompanying it, will not be treated as that of the corporation.

148. On a close examination, it will be seen that the primary focus at both stages is to identify in whom the power to do the act in question vested. At the first stage, this is done through the lens of the constitutional documents; at the second, through the lens of delegation. To put it in the terms employed in ***Barclays cases*** (*supra*), what we are seeking to identify is in whom the corporation vested the authority to do the act. The logic underlying this exercise is straightforward: where it can be said that a person has been vested with the authority to do the act by the corporation, it is only natural that the act, and the state of mind accompanying it, be treated as that of the corporation itself.

149. However, the narrowness inherent in both stages of inquiry is evident. Whether the inquiry proceeds through the route of the constitutional documents or through delegation, the net it draws around whose acts may be considered the acts of the corporation is a limited one. This is because: (i) the constitutional documents vest power in only a limited set of persons, and (ii) the requirement that delegated authority be coupled with discretion and independence is one that very few natural persons would be able to satisfy, as for various practical reasons, corporations have come to adopt increasingly layered and hierarchical structures of management in the modern world. This narrowness is further exacerbated by two related difficulties. *First*, it is not always easy to determine whether a person, in doing a particular act, was acting within the authority conferred upon them. The role that apparent authority would play in the criminal context also remains unclear. *Second*, even where such authority can be identified, doubts arise as to whether the commission of a criminal offence could ever be said to fall within such scope of authority.

150. It is precisely to address the narrowness and rigidity of the first two stages that a third stage of inquiry becomes necessary, one which introduces a degree of flexibility by looking not merely inward, at where the corporation itself has vested authority, but also outward, at the purpose of the statute in question and the surrounding circumstances of the case. Where X's act cannot be brought within the first two stages, the third stage requires the court to ask whether, for the purpose of the statutory provision under which liability is sought to be imposed, a special rule of attribution ought to be fashioned, treating X's act, and the state of mind accompanying it, as that of the corporation. This stage may play out in one of the following two ways, depending on the nature of the statutory provision in question:

a. *First*, where the statutory purpose is narrow and readily identifiable, the court is to ask the question posed by Lord Hoffmann: whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc. of the corporation? As Lord Hoffmann himself observed, the answer to this question is to be found by applying the ordinary canons of interpretation, having regard to the language of the provision, as well as its content and policy. Applied to the case of X, the court would first ask whether the purpose of the provision in question requires the fashioning of a special rule of attribution at all. If it does not, X's act, and the state of mind accompanying it, cannot be attributed to the corporation. If it does, the court would then ask whose act, for the purpose of that provision, was intended to count as the act of the corporation, and examine whether X falls within that class of persons.

b. *Secondly*, however, and as was rightly recognised in ***Barclays cases*** (*supra*), there will be cases where the statutory purpose is broad. A broad statutory purpose is capable of being applied across a wide variety of circumstances. For this reason, its content is not easily identifiable in the abstract, without reference to the facts of a given case. In such cases, the court ought not to ask, in the abstract, whether the statutory purpose requires the fashioning of a special rule of attribution. This is because the statutory purpose may not require such a rule on one set of facts, while requiring it on another. The appropriate inquiry, in such cases, is accordingly whether the statutory purpose, applied to the facts and circumstances before the court, calls for the fashioning of such a rule. Applied to the case of X, the court would ask whether the statutory purpose, on those facts and circumstances, requires a special rule of attribution treating X's act, and the state of mind accompanying it, as that of the corporation.

151. It bears emphasis that fashioning a special rule of attribution at the third stage does not involve invoking an exceptional or extraordinary judicial function. It is simply the product of ordinary statutory construction, applied to determine whose act, and the state of mind accompanying it, a provision intends to treat as the corporation's own.

(ii) <u>Necessary clarifications</u>

152. Some clarifications are necessary to read the framework laid down above in its proper sense. *First*, even where the test prescribed at a given stage of the inquiry is satisfied, it does not follow that attribution must, for that reason alone, take place. It remains open to contend, at any stage of the inquiry, that attribution ought not to follow having regard to the circumstances in which the question arises. Even where the constitutional documents vest the relevant power in X, or X has been validly delegated authority, the corporation may still contend, having regard to the circumstances in which attribution is sought, that X's act should not be treated as its own. English law illustrates this through what has come to be called the fraud exception, under which a director's fraud practised on the company is not attributed to it.[93] However, precisely what context

[93] ***Stone & Rolls Ltd v Moore Stephens***, [2009] UKHL 39; ***Jetivia SA v Bilta (UK) Ltd (in liquidation)*** [2015] UKSC 23. However, such an approach to attribution has not been devoid of criticism – *see* Rachel

should prevent attribution remains a difficult question, and it remains to be seen how the law on this develops in India.

153. *Secondly*, a point emphasised by Lord Hoffmann in ***Meridian Global*** (*supra*) bears repetition here. The inquiry into attribution is not concerned with corporate metaphysics, i.e., with locating some abstract 'directing mind and will' or 'brain' of the corporation. Consequently, the inquiry, at every stage, does not ask who may generally be said to run, control, or embody the corporation. It asks only whose act, in relation to the particular transaction or matter in question, is to be treated as the corporation's own. The ***Barclays cases*** (*supra*) are illustrative. The relevant transaction there was the capital raising, and it was authority over that specific transaction, and not authority over Barclays' affairs generally, that the courts examined. Further, once a person is identified as the corporation's directing mind in general terms, every act of that person risks being attributed to the corporation, regardless of its subject matter. [94] Confining the inquiry to a particular transaction avoids such difficulties from arising.

154. *Thirdly*, and perhaps the most important of these clarifications, is the question of when this framework need not be invoked at all. The manner in which corporate criminal liability is imposed depends on the statute creating the offence in question. It follows that whether the framework set out above must be invoked at all is also a question that can be answered by reference to the statute itself. Three situations may be noted where, generally speaking, the framework will not be required:

a. *First*, where a statute itself supplies the answer, whether by naming the class of persons whose acts and state of mind are to be treated as those of the corporation, or otherwise, there is no

---

Leow, *Attribution and Agency: Back to Basics Again*, in Sinéad Agnew & Marcus Smith (eds.), *Law at the Cutting Edge: Essays in Honour of Sarah Worthington* (Hart Publishing 2024).

[94] On the dangers of adopting an approach based on anthropomorphism, *see* Eilís Ferran, *Corporate Attribution and the Directing Mind and Will*, 127 L.Q.R. 239 (2011) & Stefan H.C. Lo, *Context and Purpose in Corporate Attribution: Can the "Directing Mind" Be Laid to Rest?*, 4 J. Int'l & Comp. L. 349 (2017).

occasion to resort to the framework at all. It is the statute itself which furnishes the basis for attribution.

b. *Secondly*, certain statutes contain provisions creating a legal fiction by which a corporation may be held vicariously liable for the offences of its officers. Where such a provision exists, the framework has, once again, no application.

c. *Thirdly*, regulatory offences imposing strict or absolute liability stand on a different footing. As with the position under English law discussed above, no question of attribution arises where the offence imposes liability on the corporation directly.[95] Nor does such a question arise where, even absent such an express provision, courts have construed the provision broadly enough that the act in question can be conceived as having been done by the corporation itself. In either case, the acts of the corporation's employees are already, whether by the statute itself or by such construction, treated as the acts of the corporationc, and attribution is unnecessary.

Thus, for the sake of generalisation, it may be said that the framework will come into play principally in relation to offences which were framed with natural persons in mind and require proof of *mens rea*.

155. *Fourthly*, the framework discussed above, and the attribution it entails, operates in one direction only (from the natural person to the corporation) and not in the reverse direction (from the corporation to the natural person). It follows that the framework has no bearing on the liability of the natural person concerned. That liability continues to be governed by the ordinary principles of criminal law, and remains unaffected by whether or not attribution to the corporation is established.

---

[95] *See* ***Bijoy Kumar Moni v. Paresh Manna & Anr***, (2026) 5 SCC 380; S***tate (Delhi Administration) vs I. K. Nangia And Anr*** (1980) 1 SCC 258; ***Madhumilan Syntex Ltd. v. Union of India***, (2007) 11 SCC 297; ***Employees' State Insurance Corpn. v. Harrison Malayalam (P) Ltd.***, (1993) 4 SCC 361.

156. *Lastly*, the framework set out above has been laid down only in broad and general terms, as that is what is required within the scope of the matter before us. The framework is accordingly helpful only in a limited way. It assists in understanding, in principle, when attribution may apply. It does not purport to answer the host of other questions that may arise in relation to corporate criminal liability.

(iii) Observations on the framework

157. The framework set out above may be described as being balanced in two ways. *First*, it is narrow in its first two stages, which lends it certainty, and flexible in its third, which allows statutory purpose to be given effect where the first two stages fail to do so. *Second*, the first two stages look inward, at the corporation's internal structure, while the third looks outward, at the external circumstances in which the statute operates. To this limited extent, the framework echoes the narrow approach sought to be adopted in ***Esso Standard*** (*supra*), and the flexible approach sought to be adopted in ***Syndicate Transport*** (*supra*) and ***A.D. Jayaveerapandia*** (*supra*). However, it adopts neither approach in full.

158. As can be observed, the framework set out above is, by and large, reflective of the discussion on English law traced earlier in this judgment. It draws upon the identification doctrine as articulated in ***Tesco Supermarkets*** (*supra*), adopts the rules of attribution as developed in ***Meridian Global*** (*supra*), and incorporates the sequential, hierarchical approach to their application as developed in ***Barclays cases*** (*supra*), and those cases' understanding of what each stage of the inquiry entails.

159. True to this reflection, the criticism directed at the English position also carries over to the framework laid down above. Despite the flexibility introduced at its third stage, the framework remains, at its core, a narrow one. It may not be easy to convict a corporation for the acts of natural persons acting for it, even where those agents wielded considerable

control over the corporation's affairs. ***Barclays cases*** (*supra*) are illustrative of this.

160. Indeed, the framework set out above does not recognise a standalone, status based rule of attribution, one under which status within the corporation, by itself, suffices to attribute an act and state of mind to it. We do not believe any such implied rule exists under company law. Nor do we doubt the rationale underlying the second stage's requirement of authority. A corporation can only be held liable for acts it has authorised, and not otherwise. This does not mean that status plays no role under the framework. At the third stage, status may still weigh heavily in favour of fashioning a special rule of attribution. This is because status vests in a person the ability to influence the corporation's affairs, and since it is the corporation itself that confers this ability, it is only rational that the corporation bear responsibility for how that ability is exercised.

161. Further, if it is to be made easier for companies to be held liable for offences requiring *mens rea*, that is a task for the legislature, and not the courts. The legislature may do so in more than one way, though two possibilities may be noted here. *First*, it may act within the framework laid down above, by clearly identifying, whether in a special statute or through a general provision in the penal code, the class of persons whose acts and state of mind are to be attributed to the corporation. The statutory provisions in the United Kingdom, Canada, and Australia, discussed above, adopt this method. *Second*, the legislature may act outside the framework altogether, by enacting provisions that hold a corporation liable for failing to prevent an offence committed by persons associated with it. Section 9 of the PC Act illustrates such an approach.[96] Such provisions hold the corporation liable

[96] **Section 9(1) of the PC Act reads as follows**: *9. Offence relating to bribing a public servant by a commercial organisation.—(1) Where an offence under this Act has been committed by a commercial organisation, such organisation shall be punishable with fine, if any person associated with such commercial organisation gives or promises to give any undue advantage to a public servant intending— (a) to obtain or retain business for such commercial organisation; or (b) to obtain or retain an advantage in the conduct of business for such commercial organisation: Provided that it shall be a defence for the commercial organisation to prove that it had in place adequate procedures in compliance of such guidelines as may be prescribed to prevent persons associated with it from undertaking such conduct.*

where a person associated with it commits the underlying offence, subject to a defence that the corporation had adequate procedures in place to prevent it.

162. Whether such measures ought to be undertaken is the prerogative of the legislature, and it is not for us to comment on it. What is needed, however, is a systematic study of corporate liability, along the lines of the options paper prepared in the United Kingdom. Such a study would bring structure to the discussion, clarify the present framework, and chart the best way forward. Surprisingly little has been written on this subject in India.[97] It is time greater attention was devoted to it. Corporate liability deserves to be taken more seriously than it presently is.

163. Prosecuting agencies, for their part, must accept that corporations can, and should, be held liable for offences requiring *mens rea*. They must develop the skills necessary to investigate and prosecute such offences where a corporation is involved. Courts, too, must play a part by accurately tracing the corporate structure and hierarchy, understanding the manner in which delegation operates within it, and assessing the extent of the role played by the persons concerned in the matter before them, both in terms of actions and omissions.[98]

(d) <u>Summary</u>

A summary of our discussion on corporate criminal liability and attribution under Indian law is as follows:

164. Indian courts confronted two questions on corporate criminal liability: (i) whether a corporation could be prosecuted for an offence carrying mandatory imprisonment; and (ii) whether a corporation could be prosecuted for offences requiring *mens rea*. For a considerable period, several High Courts answered both in the negative. The reasoning was

[97] See – 41st Law Commission Report, 1969.
[98] For a brilliant example of this, *see* ***Dr. Mani Kumar Chhetri v. State of West Bengal***, 2017 SCC OnLine Cal 8423.

rooted in the understanding that a corporation having no physical body could not be imprisoned and, having no mind, could not possess *mens rea*.

165. Clarity on the issue of mandatory imprisonment was reached only with this Court's decision in ***Standard Chartered Bank*** (*supra*). By a majority of 3:2, this Court held that a company is not rendered immune from prosecution merely because the offence carries a mandatory sentence of imprisonment, so long as the provision also prescribes a fine. The reasoning adopted by the majority was that since imprisonment cannot possibly be imposed on a company, and the law does not compel the impossible, a judicial discretion to impose a fine alone must be read into such provisions when dealing with juristic persons.

166. On the issue of *mens rea*, some High Court decisions took a position contrary to the traditional view, holding that a corporation could be held liable for offences requiring *mens rea*. According to such rulings, this was achieved by attributing to the corporation the act and the state of mind of an agent acting on its behalf. These rulings went a step further and also considered the basis on which such attribution was to occur, though they did not speak with one voice on this aspect. In ***Syndicate Transport*** (*supra*) and ***A.D. Jayaveerapandia*** (*supra*), the Bombay and Madras High Courts, respectively, adopted a flexible, case-to-case approach, leaving the question of attribution to be determined on the facts and circumstances of each case. In ***Esso Standard*** (*supra*), however, the Bombay High Court took a more stringent view, rejecting a case-to- case approach in favour of attribution traceable either to the officer's authority or to the company's intention as expressed under its constitutional documents.

167. While the High Courts were grappling with the issue of *mens rea*, it was only in ***Velliappa Textiles*** (*supra*) and ***Iridium India*** (*supra*) that this Court came to express its view explicitly. In both decisions, this Court held that a corporation is capable of possessing *mens rea*, and can accordingly be held liable for offences requiring proof of such *mens rea*.

168. The position under Indian Law is thus clear that a corporation can be prosecuted for an offence notwithstanding that it carries a mandatory sentence of imprisonment, or requires proof of *mens rea*. It appears that a corporation cannot be prosecuted only where the offence is punishable with imprisonment alone, or where the offence, by its nature, requires personal malicious intent, such that it is incapable of commission by a corporation at all.

169. It bears noting that, unlike the High Court decisions, which went on to consider the basis on which *mens rea* could be attributed to a corporation, this Court in ***Velliappa Textiles*** (*supra*) and ***Iridium India*** (*supra*) did not address the question of attribution at all. The discussion in both decisions was confined to whether a corporation could possess *mens rea*, not to how, or through whom, such *mens rea* was to be attributed to it. On this aspect, therefore, no ready answer exists. The gap remains to be filled.

170. The inquiry into how a corporation possesses *mens rea* is, in substance, an inquiry into how the *mens rea* of a natural person is to be attributed to a corporation. Answering this question also answers two connected questions: *first*, the kind of liability such attribution imposes on the corporation; and *second*, whose state of mind is to be attributed to the corporation, and in what circumstances. Neither the IPC nor the recently enacted Bharatiya Nyaya Sanhita, 2023, provide answers to these questions, unlike the penal codes of certain other jurisdictions.

171. In this context, by taking guidance from the approach adopted under English law, we have established a framework which proceeds through three stages. The framework is hierarchical and sequential in nature wherein movement from one stage to the next occurs only where attribution cannot be established at the stage preceding it. Crudely put, each stage proceeds in the following manner:

a. The first stage asks whether the corporation's constitutional documents, or a rule implied by company law, vest the person concerned with the power to do the act in question.

b. The second stage asks whether that power was delegated to the person concerned, whether expressly or impliedly, with sufficient discretion and independence in the doing of the act.

c. The third stage, in turn, asks one of two questions, depending on the nature of the statutory purpose involved. Where the statutory purpose is narrow, it asks whether that purpose, considered in the abstract, requires the fashioning of a special rule of attribution. Where the statutory purpose is broad, it asks instead whether the statutory purpose, having regard to the facts and circumstances of the case, requires the fashioning of such a rule. In either case, where the answer is in the affirmative, the court must further ask whether the person concerned falls within the net of the special rule so fashioned.

172. However, in understanding the framework laid down above, and its application, certain points need to be kept in mind. *First*, it remains open to contend that attribution ought not to follow, having regard to the circumstances in which the question arises. English law illustrates this through what has come to be called the fraud exception, under which a director's fraud practised on the company is not attributed to it. *Second*, the inquiry at each stage is transaction specific, and does not seek to identify a corporation's directing mind in the abstract. *Third*, the framework is not invoked in every case involving corporate criminal liability. Generally speaking, it comes into play only in relation to offences which were framed with natural persons in mind, and which require proof of *mens rea*. *Fourth*, the framework operates to allow attribution to occur only in one direction, i.e., from the natural person to the corporation, and has no bearing on the liability of the natural person concerned. *Fifth*, and finally, the framework has been laid down only in broad terms to answer

the general question of attribution, and does not purport to resolve every issue that may arise in relation to corporate criminal liability.

173. It is evident, from the discussion above, that the framework mirrors certain aspects of the English law approach. Consequently, it also mirrors the criticism directed at that approach, namely, that it is narrow, and it will not ordinarily be easy to convict a corporation for the acts of persons acting for it, even where those persons wielded considerable control over its affairs. That said, status, while not a standalone basis for attribution, will often weigh heavily as a factor at the third stage.

174. Nonetheless, if the goal is to make it easier for companies to be held liable for offences requiring *mens rea*, that is a task for the legislature, and not the courts. Whether, and how, the legislature does so is a matter entirely within its prerogative. It may do so by (i) clearly laying down, whether generally or within a specific statute, whose acts and state of mind are to count as those of the corporation, or (ii) enacting failure-to-prevent offences. These options are merely illustrative and not exhaustive. However, what is definitely needed is a systematic study of corporate liability in India, along the lines of the options paper prepared in the United Kingdom. Such a study would bring structure to the discussion, clarify the present framework, and chart the best way forward on this issue, which has, thus far, received surprisingly little attention.

IV. WHETHER PROCEEDINGS CAN BE QUASHED ON THE SOLE GROUND OF NON-IDENTIFICATION AND NON-ARRAIGNMENT

175. Having laid down the basis on which a corporation may be said to possess *mens rea*, we must now focus our attention on the question arising before us in the facts of the present matter. In essence, the Appellant's argument, as noted above, is that a prosecution against a corporation, for an offence requiring *mens rea*, is maintainable only where a natural person has been identified and arraigned alongside it. Since the same has not been done,

the High Court ought to have exercised its power under Section 482 of the Code of Criminal Procedure, 1973 ("**CrPC**") to quash the proceedings.

176. The question before us, then, is whether the High Courts ought to exercise their power under Section 482 CrPC to quash proceedings against a corporation, alleged to have committed an offence requiring *mens rea*, on the sole ground that no natural person had been identified or arraigned alongside it. This question arises, and must be answered, strictly in terms of the inherent powers vested with the courts under Section 482 CrPC, and not otherwise. It is therefore necessary to take note of the principles that govern the exercise of this power.

177. We do not consider it necessary to burden this judgment with an extensive discussion of the principles governing the exercise of the High Court's power under Section 482 of the CrPC.[99] The position is well settled, and it is sufficient, for present purposes, to note the following. *First,* this power may be exercised only in exceptional circumstances, and its exercise is the exception, and not the rule.[100] *Secondly*, though the power is wide, it must be exercised with great caution.[101] *Thirdly*, at its core, the enquiry is confined to examining whether the allegations, taken at face value, without addition or subtraction, disclose the commission of an offence.[102] *Fourthly*, this power cannot be exercised on an assessment of whether the allegations are likely to be established at trial, or whether sufficient evidence exists to sustain them, i.e., the High Court at this stage cannot delve into appreciating evidence or conducting a mini trial.[103]

178. From the framework we have laid down above, two propositions follow. *First*, a corporation can possess *mens rea* only through attribution. *Secondly*, since the framework adopted seeks to fit corporate criminal liability within

[99] For a detailed discussion of precedents on this aspect, see ¶10, ***Neeharika Infrastructure Private Limited v. State of Maharashtra***, (2021) 19 SCC 401.
[100] ***Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd.***, (2000) 3 SCC 269.
[101] ***Satish Mehta v. State (NCT of Delhi) & Another***, (2012) 13 SCC 614.
[102] ***State of Haryana v. Bhajan Lal***, 1992 Supp (1) SCC 335; ***Chunduru Siva Ram Krishna v. Peddi Ravindra Babu***, (2009) 11 SCC 203; ***Indian Oil Corpn v. NEPC India Ltd. & Ors***, (2006) 6 SCC 736.
[103] ***Abhishek Singh v. Ajay Kumar & Ors.***, 2025 INSC 807.

the existing, individualistic conception of criminal law, the requisite *mens rea* must be found, in full, within at least one natural person before it can be attributed to the corporation. There may, of course, be more than one such person. Corporate *mens rea* cannot, therefore, be assembled by combining the partial states of mind of different individuals. Natural persons are, in this sense, the foundation on which corporate *mens rea* rests.

(a) <u>The Identification aspect</u>

179. Do these two propositions, by themselves, answer the question before us? Two elements arise for consideration: identification and arraignment. Let us consider 'identification' first. Identification here refers to the exercise of pinpointing the actual person or persons involved, the specific acts undertaken by them, and their state of mind, whether averred directly or inferred from the surrounding circumstances.

180. Non-identification would lead to the exercise of the power under Section 482 CrPC if it does not, *prima facie*, disclose the commission of an offence. Whether the allegations disclose the commission of an offence may itself be examined in two ways: by asking whether the role of the concerned person has been clearly charted out, or by asking whether the averments make out the essential ingredients of the offence. There is, of course, overlap between the two. But for the convenience of our discussion here, let us treat them as two different standalone elements.

181. First, take the role angle. This is best understood by looking at how courts have approached a related scenario: where a natural person has been arraigned alongside a corporation and seeks quashing of the proceedings. In such situations, the courts examine whether the allegations disclose the specific role that the concerned person had played in the commission of the crime. Where a person has been arraigned simpliciter, based on position or status alone, without any role being attributed to them, courts

have ordinarily quashed the proceedings against such persons.[104] This is because, in the absence of such averments, the allegations would not disclose the commission of an offence by that person, and criminal law, unless the statute explicitly provides for it, does not recognise vicarious liability. Indeed, even under provisions that create vicarious liability based on a person being 'in charge of' or "responsible for" the conduct of a corporation's affairs, courts have held that a specific averment to that effect is necessary, absent which the proceedings against such a person are liable to be quashed.[105] Viewed from this angle, the question is whether non-identification of the natural person who acted for the corporation renders the allegations incapable of disclosing the corporation's own role in the offence, such that the proceedings are liable to be quashed on that ground.

182. Secondly, consider the question from the standpoint of the essential ingredients of the offence. Where *mens rea* is one such ingredient, it too must be disclosed, at least *prima facie*, by the allegations. As discussed above, a corporation can possess *mens rea* only through attribution from a natural person. It may accordingly be argued that, absent identification of that person, the allegations disclose no such attribution, and the ingredients are not made out. Viewed from this angle, the question is whether non-identification renders the allegations incapable of disclosing the essential ingredients of the offence, such that the proceedings are liable to be quashed on that ground.

183. We do not think either question framed above should be answered in the affirmative. Take the role angle first. What the chargesheet must disclose, on its face, is that the corporation itself has committed the offence, not that it has also identified the particular individual through whom it did so. The

---

[104] ¶19-22, ***Shiv Kumar Jatia v. State of NCT of Delhi***, (2019) 17 SCC 193; ¶ 31, ***K. Sitaram v. CFL Capital Financial Service Ltd.***, (2017) 5 SCC 725; ¶13-14, ***Maksud Saiyed v. State of Gujarat***, (2008) 5 SCC 668; ¶46 & 55 ***Sunil Bharti Mittal v. Central Bureau of Investigation***, (2015) 4 SCC 609.
[105] ¶16-22, ***N. Rangachari v. BSNL***, (2007) 5 SCC 108; ¶24-25 & 31, ***Pawan Kumar Goel v. State of U.P. & Anr***, 2022 SCC OnLine SC 1598; ¶16-18, ***K.K Ahuja v. V.K. Vora***, (2009) 10 SCC 48; ¶18, ***SMS Pharmaceuticals Ltd v. Neeta Bhalla***, (2005) 8 SCC 89.

corporation's role can be disclosed through averments concerning its own conduct, decisions, and dealings without naming the individual who carried them out. Non-identification of the natural person does not, by itself, render the allegations incapable of disclosing the corporation's role in the offence.

184. The same holds for the ingredient angle. Corporate *mens rea*, as discussed, exists only because some natural person holds it. However, it does not follow that the materials before the court dealing with quashing must identify particular persons for the allegations to disclose the ingredient of *mens rea*. In most circumstances, *mens rea* can be averred through the surrounding facts and conduct themselves, without being tied to a specifically named individual.[106] Thus, where the surrounding facts and circumstances, taken as a whole, disclose the possibility that the corporation acted with the requisite *mens rea*, that disclosure is not defeated merely because no particular individual has been identified as its source.[107] Therefore, the ingredient of *mens rea* can still be disclosed even where no individual has been identified.[108]

185. It would, no doubt, assist matters if the natural persons concerned, and their specific acts, are identified and averred. But this goes to the strength of the case, not to whether the allegations disclose an offence at all. The role of attribution, properly understood, is to establish *mens rea* conclusively, and that is a task to be undertaken during the trial.[109] The framework laid down above also makes clear that attribution is not a simple question with a fixed set of answers. It is an intricate inquiry, involving the consideration of several factors. Consequently, whether attribution ought to occur in a given case is ultimately a matter for trial.

---

[106] ***Somjeet Mallick v. State of Jharkhand***, (2024) 10 SCC 527.
[107] ¶17-18, ***Rupan Deol Bajaj v. Kanwar Pal Singh Gill***, (1995) 6 SCC 194; ***Umashankar Yadav v. State of U.P.***, 2025 SCC OnLine SC 1066.
[108] See ***Teamsters Local 445 Freight Division Pension Fund v. Dynex Capital, Inc.***, 531 F.3d 190 (2d Cir. 2008).
[109] ¶18-20, ***Rajat Prasad v. CBI,*** (2014) 6 SCC 49.

Identification, in this sense, is accordingly a question that does not assume primary importance at the threshold.

186. Viewed from another angle, insisting on identification at this threshold risks something further: it would permit the power under Section 482 CrPC to be exercised in a manner that stifles prosecution at the outset, even where the allegations make out an offence against the corporation in clear terms. This may play out in more than one way. A complainant filing an FIR against a corporation often only knows that someone within the corporation committed the act in question, without any means of knowing who.[110] To an extent, this may hold even once the investigation is complete. The investigating agency may not always be able to identify the individual actually responsible, yet may still, based on other circumstances, arrive at the conclusion that the corporation committed the offence with the requisite *mens rea*. Were identification pressed as a general rule in dealing with companies, prosecution in such instances would be stifled at the very threshold.

187. It is thus clear that declining to require identification as a general rule ensures that the power under Section 482 CrPC is exercised within the scope of the principles laid down above. All that is required, at this stage, is that an offence be made out, and this is made out irrespective of identification. Attribution, as a process, requires going into the niceties of a given case, and since the Court at this stage cannot undertake that exercise, identification is not a question that ought to be of importance at the threshold. Consequently, the Appellant's contention that the proceedings against it be quashed solely on the ground of non-identification of a natural person cannot be sustained.

(b) The Arraignment aspect

188. If identification is not required at this stage, it would ordinarily follow that arraignment is not required either, since arraignment is, in substance, the

---

[110] *See* ¶27, ***United Spirits Limited v. Neel Rajsh Shah***, 2024 SCC OnLine Kar 31856.

procedural corollary of identification. One aspect, however, merits closer attention. This Court has, in the reverse scenario, held that where a corporation has not been arraigned as an accused, proceedings against the natural person alone cannot be sustained. The question that arises is whether the same logic applies here, i.e., whether the non-arraignment of a natural person must, correspondingly, be fatal to proceedings against the corporation. It is in this context that this Court's decision in ***Aneeta Hada v. Godfather Travels and Tours Pvt. Ltd.***, reported in **(2012) 5 SCC 661**, merits consideration.

189. In ***Aneeta Hada*** *(supra)*, a three judge bench of this Court considered whether a person falling within Section 141(1) and 141(2) of the Negotiable Instruments Act, 1881, or a *pari materia* provision, could be prosecuted without the company itself being impleaded as an accused. This Court, after considering the relevant authorities, held that for maintaining a prosecution under Section 141, arraigning the company as an accused is imperative. The relevant extracts are as follows:

> *"21. At this juncture, we may refer to Section 141 which deals with offences by companies. As the spine of the controversy rests on the said provision, it is reproduced below:*
>
>> *"141.Offences by companies.—(1) If the person committing an offence under Section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:*
>>
>> *Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:*
>>
>> *Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the*

case may be, he shall not be liable for prosecution under this chapter.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any Director, Manager, Secretary or other officer of the company, such Director, Manager, Secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

22. On a reading of the said provision, it is plain as day that if a person who commits the offence under Section 138 of the Act is a company, the company as well as every person in charge of and responsible to the company for the conduct of business of the company at the time of commission of offence is deemed to be guilty of the offence. The first proviso carves out under what circumstances the criminal liability would not be fastened. Sub-section (2) enlarges the criminal liability by incorporating the concepts of connivance, negligence and consent that engulfs many categories of officers. It is worth noting that in both the provisions, there is a "deemed" concept of criminal liability.

xxx

53. It is to be borne in mind that Section 141 of the Act is concerned with the offences by the company. It makes the other persons vicariously liable for commission of an offence on the part of the company. As has been stated by us earlier, the vicarious liability gets attracted when the condition precedent laid down in Section 141 of the Act stands satisfied. There can be no dispute that as the liability is penal in nature, a strict construction of the provision would be necessitous and, in a way, the warrant.

xxx

58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted.

59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V. Parekh which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada is overruled with the qualifier as stated in para 51. The decision in Modi Distillery has to be treated to be restricted to its own facts as has been explained by us hereinabove."

[Emphasis Supplied]

190. It follows from the above that the ruling in ***Aneeta Hada*** (*supra*) is tied to the specific statutory scheme of Section 141. That provision creates vicarious liability, attracted only where its statutory condition precedent, i.e., the commission of the offence by the company, stands satisfied. Since the liability of the individual under Section 141 is thus entirely derivative of the company's own commission of the offence, that condition cannot be adjudicated unless the company itself is made a party to the proceeding. It was for this reason that this Court held that arraigning the company as an accused is imperative for maintaining a prosecution against a natural person under Section 141.

191. The Appellant has also placed reliance on this Court's decision in ***Hindustan Unilever Ltd. v. State of M.P.***, reported in **(2020) 10 SCC 751**. In that case too, this Court was dealing with a provision similar to Section 141, i.e., Section 17 of the Prevention of Food Adulteration Act, 1954. Following ***Aneeta Hada*** (*supra*), this Court held that, for the prosecution against a person to be maintainable, the company had to be arraigned as an accused.

192. The rulings in ***Aneeta Hada*** (*supra*) and ***Hindustan Unilever*** (*supra*), respectively, cannot be read as establishing a general rule that arraignment of a natural person is a prerequisite for a corporation's prosecution to be maintainable. Such principle can be imported only where the statute in

question is of the same character as those considered in the said cases, i.e., where the liability imposed on the corporation is vicarious, and the statute itself lays down a condition precedent.

193. The facts of the present case do not involve any such provision. This is not a case of vicarious liability, nor does any condition precedent of that kind exist. Indeed, it is the very absence of vicarious liability that requires recourse to the framework laid down above to determine attributability. As discussed above, the framework fixes the corporation with direct liability, i.e., once its requirements are satisfied, the act and the state of mind in question are treated as the corporation's own. Consequently, the contention that the High Court ought to have quashed the proceedings against the Appellant for non-arraignment of a natural person cannot be accepted.

194. We reiterate that we have considered the questions of identification and arraignment of a natural person specifically in the context of the exercise of power under Section 482 CrPC, and not otherwise. Since we were concerned only with whether non-identification and non-arraignment justify the exercise of that power, we have not generally examined whether such identification and arraignment are necessary at all, and if so, at what stage. That question is beyond the scope of the matter before us.

(c) <u>Whether the allegations make out an offence?</u>

195. Our discussion above should not be read and understood to suggest that the power under Section 482 CrPC can never be exercised at the threshold stage where the accused is a corporation. All that is being said is that neither identification nor arraignment of a natural person can be read in as a prerequisite, such that their absence alone would justify quashing in every case. For corporations, as for natural persons, the ordinary test is retained, i.e., the allegations must disclose the commission of the offence. Where they do not, or where they amount to bald allegations unsupported by any material, quashing would remain warranted. It is only by adopting

such an approach that the two undesirable outcomes can be avoided: genuine prosecutions against corporations are not stifled at the threshold, and, at the same time, vexatious or baseless prosecutions are not permitted to continue merely because the accused is a corporation.

196. The considerations that should ordinarily weigh while determining whether the allegations disclose commission of any offence, or whether they amount to mere bald allegations, would remain the same where the accused is a corporation. However, as a corporation is a juristic person, it is not just sufficient to state or allege that the corporation committed the act or possessed the requisite *mens rea*. While identification and arraignment of a natural person is not necessary, the allegations must, at least *prima facie*, reveal that: (i) some natural person or persons acted on behalf of the corporation, (ii) such action is referable to the offence in question, and (iii) the surrounding circumstances of such actions do not render the existence of *mens rea* patently absurd or inherently improbable. Where the allegations do not reveal these things, the proceedings would remain liable to be quashed. It bears emphasising that the inquiry at this stage is not detailed or microscopic. It is broad, and confined to examining whether the allegations disclose actions undertaken on behalf of the corporation, and whether the context in which such actions were undertaken discloses the possibility that the requisite *mens rea* was present.

197. On a *prima facie* reading of the chargesheet and the material on record, it is evident that natural persons acted on behalf of the Appellant in relation to the offences in question, and that the surrounding circumstances give rise, at least *prima facie*, to the possibility that these acts were undertaken with the requisite *mens rea*. This is sufficient at this stage, and nothing further needs to be examined. Consequently, on this basis too, it cannot be said that the High Court ought to have quashed the proceedings against the Appellant.

198. Before closing, we deem it necessary to highlight one another aspect. The question framed by the High Court was directed at a limited set of persons,

namely, the directors and persons in charge of the corporation's affairs. The question we have answered above, and the discussion preceding it, was not so confined. It extended to natural persons in general, not merely to those occupying such formal positions of authority. This wider framing was necessary, since the attribution framework developed above confirms that it is not only persons holding such positions who may attribute their acts to the corporation. The necessary consequence is that, save in the rarest and most exceptional of circumstances, a quashing petition would not succeed merely on the ground that the person identified cannot attribute his acts to the corporation because he does not hold a particular status or position. Whether a concerned person's act and state of mind ought to be attributed to the corporation requires the systematic application of the framework set out above, and that, in turn, requires answers to questions that can legitimately be considered only at the trial.

E. CONCLUSION

199. For the foregoing reasons, the appeal fails and is hereby dismissed.

200. Pending applications, if any, shall stand disposed of.

201. Registry shall forward one copy of this judgment to all the High Courts.

.. J.
(J.B. PARDIWALA)

.. J.
(MANOJ MISRA)

New Delhi.
7th September, 2026.