# Mulki Suryanarayanrao Rau And Another vs Gurushant Gangadhar Kamble And Others on 5 January, 1987

## Equivalent citations: (1987)89BOMLR178, 1987(30)ELT712(BOM)

JUDGMENT

1. These two writ petitions under Article 227 of the Constitution of India read with Section 482 of the Criminal Procedure Code, 1973, involve common questions of facts and law and, therefore, were heard together and are being disposed of by this common judgment.

2. Respondent No. 1 Gurushant Gangadhar Kamble - Assistant Collector, Central Excise (Preventive), with his Headquarters at Pune (hereinafter referred to as "the complainant"), in both the petitions, filed Criminal Case No. 9 of 1986 in the Court of the learned Chief Judicial Magistrate, Pune, against M/s. Kirloskar Brothers Ltd., a limited company having their head officer at Udyog Bhavan, Tilak Road, Hirabaug, Pune-2 (hereinafter referred to as "the company") and M/s. Kirloskar Proprietary Limited, Karve Road, Kothrud, Pune-29 (hereinafter referred to as "accused No. 31") and 35 persons, charging them for offences punishable under Section 9(1)(b), (bb), (c) and (d) of the Central Excises and Salt Act, 1944 (hereinafter referred to as "the Act"), read with Section 120B of the Indian Penal Code. Petitioner No. 1 - Mulki Suryanarayanrao Rau and Petitioner No. 2 - Ramachandra Vyankatesh Deshpande in Criminal Writ Petition No. 1014 of 1986 are the original accused Nos. 8 and 9 respectively are Petitioner No. 1. Vinayak Narayan Datye and Petitioner No. 2 - Kalambettu Subraya Bhat in Criminal Writ Petition No. 1066 of 1986 are the original accused Nos. 10 and 28 respectively. These four petitioners shall hereinafter be referred to as "accused Nos. 8, 9, 10 and 28."

3. By these petitions accused Nos. 8, 9, 10 and 28 seek to quash the process issued against them by the learned Chief Judicial Magistrate, Pune.

4. It would be appropriate to state brief facts of the case before I embark upon appreciating the submission made by the learned counsel appearing on behalf of either side. They are as under.

5. As stated above, accused No. 1 is M/s. Kirloskar Brothers Ltd. Accused No. 2 is the Chairman and accused Nos. 3 to 18 were/are the Directors and accused Nos. 19 to 30 are the senior executive officer of the said company. According to the complainant, accused Nos. 3 to 30 were in charge of an responsible to the company for the conduct of the business at the time of the commission of the offences. Accused Nos. 32 to 36 were the Directors of accused No. 31, i.e., M/s. Kirloskar Proprietary Ltd. while accused No. 37 is the Secretary of this company. It may be noted here that proceeding against accused Nos. 17 and 36 is quashed by this Court in Criminal Writ Petition Nos. 335 and 219 of 1986.

6. The prosecution case is that accused No. 1 - Company manufactures hermetically sealed compressors of various categories. At all the material times, the day-to-day work of the factory was

managed by the Board of Directors, i.e., accused Nos. 2 to 18 and the said work was supervised by senior business executive, i.e., accused Nos. 19 to 22 and 24 to 30. Accused No. 23 worked as the President. It is alleged that on the basis of certain information received and in the reasonable belief that accused No. 1 - Company was evading payment of Central Excise duty, the factory premises and its registered office as well as branch offices and the residences of some of the Directors were searched by the complainant and his officers on and after 9th December, 1985. Several incriminating documents showing undervaluation of their products and miscalculations of assessable value were recovered and seized. Records of accused No. 1 - Company for the period of 5 years, prior to 9th December, 1985, were examined and it was clear that accused No. 1 - Company had committed offences of evasion of Central Excise duty amounting to more than rupees five crores. The complainant alleged that accused No. 1 - company and its Directors, being accused Nos. 2 to 18, deliberately declared lower prices of their product during the period from 1-1-1981 to 31-10-1983. The complainant also alleged that three price lists were recovered during the search, two from Secunderabad and one from Madras. The two price lists recovered from Secunderabad officer were to come in force from 15-9-1984 and 1-1-1985 respectively. The price lists recovered from Madras office was to come in force from 1-11-1983. According to the complainant, accused Nos. 1 to 30 consciously declared less value of assessment by excise department and had worked out the cost structure of various machines and had thus hit upon a plan to suppress the aforesaid charges which ought to have been included in the assessable value.

7. The complainant then explained the modus operandi of the accused persons for evading excise duty stating that :

> "In the course of investigation, it was found that object of evading Central Excise duty and at the same time recovering economic price of compressors was duly and successfully achieved by adopting the following methods :-
>
> (a) Additional amounts under the head of handling charges, freight, insurance, repair charges, and surcharge were recovered.
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> (b) From 1-1-1981 to 14-1-1982 blanket charge of Rs. 40 per compressors was collected on all models of compressors towards freight and insurance on all sales effected through area offices. However, the aforesaid amount of Rs. 40 varied in some cases up to even Rs. 200 at depots like Secunderabad and Calcutta.
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> (c) From 15-1-1982 the amounts of freight and insurance varied from Rs. 45 to Rs. 75 such charges varying according to the models of compressors supplied to customers. The said position continued till 17-10-1982.
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> (d) On 22nd October, 1983, accused No. 1 circulated a letter on the subject of price revision of hermetically sealed compressors and under instruction No. 3, following directions were given to area officers :-

All field officers will charge Rs. 40 per compressor towards equivalent freight in their bills. Over and above, the following charges will be recovered from customers :-

Rs. 85 per compressor for all AE Model.

Rs. 210 per compressor for all AHR 13 Model.

Rs. 135 per compressor for all other Models.' The further instruction was, 'Separate depot advices for handling charges will be raised as decided in the earlier meeting.'"

The complainant alleged that by adopting the aforesaid modus operandi accused Nos. 1 to 30 till 1-11-1983 succeeded in getting the price which they ought to have received for sale of compressors and at the same time, successfully defrauded the Central Excise Department by evading payment of excise duty as a part of their planned action. Further allegations are that a resolution was passed on 14-12-1983 by accused Nos. 1 to 30 and a conference was held on 10-4-1984 and the record shows what transpired at the said conference. Still another activity of accused Nos. 1 to 30 for evasion of excise duty, according to the complainant, was that the trade mark of accused No. 1 - Company was assigned to accepted No. 31-company and the right of user of the trade mark was allotted to accused No. 1-company and they in turn decided to reduce the price of the compressors relating to warranty charges and allowed accused No. 31-company to issue warranty against the cost manufactured by accused No. 1-company. The complainant found that the monies recovered by accused No. 31-company were siphoned back to accused No. 1-company. In other words, the prosecution case is that accused No. 1-company evaded excise duty fradulently and dishonestly and accused Nos. 2 to 30, who were responsible for the day-to-day working of the said company, conspired together and aided and abetted the commission of the offence of evasion of excise duty by accused No. 1-company and from October, 1983 the sister company-accused No. 31 through its Directors and Secretary, being accused Nos. 32 to 37, also joined in the said conspiracy and together defrauded the department in the payment of excise duty.

8. Now, Mr. Desai, learned counsel appearing on behalf of accused Nos. 8, 9, 10 and 28, first of all pointed out that while dealing with this matter I should bear in mind the fact that accused Nos. 8 and 9 had resigned on 19th October, 1982 and accused No. 10 on 7th December, 1982 whereas the alleged offences are said to have been committed up to 9th December, 1985 on which day there was a raid. Mr. Desai then urged that in the entire complaint there is no averment to suggest that any of these accused persons did any overt act or indulged in any illegal omission to attract substantive offences under the various sub-sections of Section 9 of the Act and there is also no evidence to suggest that they had entered into any conspiracy in order to evade payment of excise duty. He further urged that none from accused Nos. 8, 9, 10 and 28 could be held liable on the principle of vicarious liability as they in their capacity as Directors and Secretary of the company can be held vicariously liable only under Section 9AA of the Act which came into force only on 27th December, 1985. Mr. Desai repeatedly urged that as Directors and Secretary, these accused persons cannot be

held responsible because the day-to-day affairs of the company were managed by the Managing Director. Mr. Desai, therefore, submitted that this is a fit case in which this Court should exercise its inherent powers to prevent abuse of the process of the lower Court in the interest of justice, especially when accused Nos. 8 and 9 are 77 and 78 years old and accused No. 10 is 92 years old and is bed-ridden and infirm for (a) long time as his eye-sight has become very poor and is hard of hearing with thinking faculty diminished. They should not be humiliated by forcing them to stand a criminal trial. In reply, Mr. Samant, learned counsel appearing on behalf of the complainant, submitted that it would not be correct to say that there are no overt acts attributed to these accused persons as regards evasion of excise duty and that there is no evidence of conspiracy against them. These accused persons are not sought to be punished on the principle of vicarious liability but on independent and direct accusations made against them in the complaint, further submitted Mr. Samant. In the submission of Mr. Samant the prosecution is possessed of sufficient evidence against these accused persons which could not be narrated in the complaint in detail and that the prosecution should be given an opportunity to adduce all that evidence in the trial Court. Mr. Samant then urged that the powers of this Court under Section 482 of the Criminal Procedure Code, 1973, should be sparingly exercised and used and this certainly is not the case in which this Court should exercise the said powers.

9. Now, to deal with the first contention of Mr. Desai that there are no overt acts or illegal commissions attributed to these accused persons to attract one or the other offences under Section 9 of the Act and their involvement in the conspiracy, which according to the prosecution is a continuing criminal conspiracy, it would be profitable to mention here some of the paragraphs from the complaint which would positively show that there is no substance in the contention raised by Mr. Desai. Thus, paragraphs 9, 10, 11 and 13 of the complaint show that on the basis of the investigation and documentary evidence recovered and seized by the Central Excise Department it was evident that accused No. 1-company had adopted the modus operandi described in the complaint in order to facilitate commission of the offences in question. What is specifically mentioned in paragraph 8 is as under :-

> "In compliance with the requirements of this Chapter, accused No. 1 is required to file a classification list and price list as provided under Rules 173B and 173C of the Central Excise Rules, 1944. I say that in compliance with these requirements of the law, accused No. 1 did file price list from time to time declaring the wholesale price as provided under Section 4 of the Act. After the aforesaid price list is to approved by the proper officer, determination of excise duty is merely a clerical task inasmuch as the assessee had to refer to the rate of duty (current) and the value approved by the proper officer and pay the determined duty to the Central Excise Department at the time of clearance of the goods.....".

Then in para 11, after setting out as to how accused No. 1-company, in compliance with the rules, has to declare Central Excise duty and how they could clear the goods only after payment of the Central Excise duty so determined, it is averred :

> "What happened in this case was that accused No. 1 and the other accused deliberately declared a lower price and violated the provision of Rules 9(1) and 173C read with Section 11A of the Central Excises and Salt Act, 1944, and the rules made thereunder."

Paragraph 11 further reads pointing out the most important averments directly involving the present accused persons as under :

> "As a matter of fact, accused Nos. 1 to 30 declared the price of hermetically sealed compressors of different models during the period from 1-1-1981 to 31-10-1983 which was uneconomic. In fact, the price at which they could have sold the compressors ought to have been very much higher than the one declared and got approved by the Central Excise Department. In the course of investigation the list showing the actual cost data of different models of compressors which was actually worked out and kept away for their own guidance was recovered. Accused No. 22, A. R. Kalluraya, was confronted with the said list and he admitted that the price list which was recovered from Karad factory showing the cost data of various models of compressors was higher than the price declared to the Central Excise authorities. I say that no industrial unit worth the name could ever afford to sell any such product at a price lower than the actual cost of the product."

Paragraph 13 of the complaint is :-

> "I say that the investigation made by the department shows that not only accused Nos. 1 to 30 were concious of the fact that the cost structure was very high as compared to the assessable value declared to the Central Excise Department, but they had also predetermined at what price they were actually to sell the compressors. I say that not only these confidential price lists were circulated but the prices and additional charges contained therein were actually recovered by all area officer uniformly."

10. The complaint also discloses direct involvement of these accused persons alongwith others and their modus operandi as to how they went on hoodwinking the excise department and avoided payment of duty. This can be seen from paragraph 16 of the complaint as stated in paragraph 7 of this judgment. From these averments it appears that the present accused persons were party to a continued criminal conspiracy and of on 19-10-1982 two of them retired and the third retired on 7-12-1982, they can still be accused of having been associated with this modus operandi which was to declare the price structure lower than the economic cost-price.

11. The complainant made the following statements in paragraph 17 :-

> "I say that in the first instance, on the assumption that surcharges had been incurred, the assessee, i.e., accused No. 1 could only claim such charges as were actually incurred. The aforesaid blanket charge of Rs. 40 per compressor was not the freight

> charge actually incurred. I say that the investigation showed that the collection of handling charges was nothing but a part of the scheme conceived by accused Nos. 1 to 30 to collect extra amounts under whatever heads just to wipe out the differences between the real price of the compressor and the price declared to the Central Excise Department. I say and submit that accused Nos. 1 to 30 were fully aware that the collections were unauthorised and they ought to have included them in the assessable value and that the said charges were recovered in order to evade payment of the legitimate and due duty on the said compressors. I say and submit that the aforesaid plan of charging extra money as and by way of handling charges and raising debit advices against buyers is a clear indication of the design and oblique motive of accused Nos. 1 to 30 in the whole affair."

12. The rest of the paragraphs of the complaint disclose the entire modus operandi that was resorted to and the manner in which the tax evasion took place. Some of the averments made in paragraph 36 may be mentioned here :

> "In the course of investigation which followed, statements of various executives such as A. R. Kalluraya, P. D. Gune, A.K. Samant, G. P. Dixit, P. G. Marathe and others were recorded. In addition, statements of some of the Directors such as accused No. 14, M. S. Kirloskar, N. B. Varde, accused No. 32 were recorded. Very important incriminating documents were also seized and on the basis of the aforesaid statements and the evidence collected, it is clear that right from 1-1-1981 till 9-12-1985, accused No. 1 and accused Nos. 2 to 18 (all Directors of accused No. 1) and accused Nos. 19 to 30, both inclusive, all business executives, were parties to a continuing criminal conspiracy hatched at Pune and Karad to commit the offence of evading Central Excise duty and for that object they conceived a scheme, details of which appear herein before, and in consequence of the said conspiracy, accused No. 1 with the active help and collaboration of the rest of the conspirators, succeeded in committing tax evasion of the order of Rs. 5.4 crores and defrauded the Central Excise Department of its legitimate excise duty."

What is alleged alternatively can be found in paragraphs 37 and 38. In paragraph 37 the accusation is made on the basis of the investigation that accused Nos. 2 to 30 for and on behalf of accused No. 1 also aided criminal conspiracy which was a continuing one, to commit the offence of evasion of Central Excise duty. In paragraph 38, all the accused Nos. 1 to 30 have been charged with having committed offences and tax evasion punishable under the Act read with Section 120B of the Indian Penal Code. Three of these accused persons who retired on different dates had been working as Directors with other co-accused persons from 1-1-1981 to 19-10-1982 and 7-12-1982. During the period, the modus operandi was that the additional charges in the form of handling charges, freight, insurance, surcharge, repair charges were collected and thus the difference in the price was wiped out. The money which the accused got by this method should have gone into the assessable value and by getting this money they avoided paying excise duty. It is also important to note that during this period rest of the superiors who continued in the continuing conspiracy were also the Directors alongwith these three retired Directors when the part of the tax evasion had taken place.

13. Mr. Desai contended that the only averment in respect of the charge, whatever, it may be, is that the three Director-accused persons were the Directors of the Kirloskar Brothers Ltd. during the period from 1-1-1981 to 19-10-1982 and as such they committed offences punishable under Section 9(1) of the Act read with Section 120B of the Indian Penal Code. Similarly, it was also pointed out by Mr. Desai that the prosecution strongly relied upon, in the affidavits and at the time of hearing, the observations made by the Supreme Court in the case of Municipal Corporation of Delhi v. Purshottam Dass Jhunjhunwala and Other, and in the case of Municipal of Delhi v. Ram Kishan Rohtagi and Others, but these rulings are irrelevant to the present case. The counsel further contended that the observation in both these judgments are in the background of the issue as to when the Directors of company could be held vicariously liable for offences under Section 7 read with Sections 16 and 17 of the Prevention of Food Adulteration Act as Section 17 created vicarious liability provided that there is a categorical averment that the Directors were in charge of and responsible of the Company in the conduct of its business at the time of commission of the offence and in our case such vicarious liability cannot be fastened on the Directors as Section 9AA of the Act which is similar to Section 17 of the Prevention of Food Adulteration Act was introduced only on 27th December, 1985.

14. Now, in the case of Ram Kishan Rohtagi, it was held that there were no clear allegations against the Directors that they were responsible for the conduct of business and, therefore, the proceedings came to be quashed of business and, therefore, Manager. It is true that in that case the Directors were sought to be punished for the act of food adulteration holding that they were responsible for the conduct of the business in their capacity as Directors as such. But it is important to note that in our case, as submitted by Mr. Samant, the present accused persons are not sought to be punished only because they are Directors but on account of their complicity in the commission of the alleged offences. In the case of Purshotam Dass Jhunjhunwala, it was held by the Supreme Court that it was a case where facts were almost identical with the facts of the case Municipal Corporation of Delhi v. Ramkishan Rohtagi but with a vital difference that unlike in the other case, para 5 of the complaint in Jhunjhunwala's case gave complete details of the role played by the respondents and the extent of their liability was also pointed out. It was clearly mentioned that Ram Krishan Bajaj was the Chairman and R. P. Neyatia was the Managing Director and respondents 7 to 11 were Directors of the Mill and were in charge of and responsible for the conduct of its business at the time of the commission of the offence and clear averments were made regarding the active role played by the respondents to the extent of their liability. The Supreme Court, therefore, held that it could not be said that paragraph 5 of the complaint was vague and did not implicate respondents 1 to 11. In our case also, as stated above, there are averments made in the complaint pointing out the complicity of the present accused persons and as submitted by Mr. Samant, they are not sought to be punished on the principle of vicarious liability with the help of Section 9AA of the Act but independently on the roles played by them. It is pertinent to note that in the complaint which was found to be perfectly in order by their Lordships of the Supreme Court in , the same allegations as in our were considered to be enough but in our case the prosecution has gone a step further in the sense that it is clearly averred in the complaint that the accused person had been parties to a criminal conspiracy.

15. Mr. Desai then urged that in order to appreciate the submission of Mr. Samant as regards the role of conspirators alleged to have been played by the present accused persons, it is necessary to

deal with the scope of a charge of conspiracy. He thus submitted that conspiracy is a highly technical offence with which the accused person can be substantively charged and there must be categorical averments of the circumstances from which a logical and irresistible inference could be drawn that the accused was a party to the crime contemplated by Section 120B of the Indian Penal Code. He also submitted that agreement of conspiracy is a positive fact which could be proved by direct evidence or circumstantial evidence. The evidence should show that there was a meeting a minds and the conspirators knew of the common design to commit a certain crime. To bring home his point he relied upon Mohd. Hussain Umar Kochra, etc. v. K. S. Dalipsinghji and Another, 1970 Cri. L.J. 9, Lennart Schussler and Another v. Director of Enforcement and Another 1970 Cri. L.J. 707, Dr. Dattatraya Narayan Samant and Others v. State of Maharashtra, 1982 Cri. L.J. 1025 and Bachcha Babu and Others v. Emperor AIR 1935 Allahabad 162.

16. As regards the case of Mohd. Hussain Umar Kochra, etc. v. K. S. Dalipsinghji and Another, 1970 Cri. L.J. 9 it was held by the Supreme Court :

> "Criminal conspiracy, as defined in Section 120A, is an agreement, by two or more persons, to do, or cause to be done, an illegal act, or an act, which is not illegal, by illegal means. The agreement is the gist of the offence. In order to constitute a single general conspiracy there must be a common design and a common intention of all to work in furtherance of the common design. Each conspirator plays his separate part in one intergrated and united effort to achieve the common purpose. Each one is aware that he has a part to play in a general conspiracy though he may not know all its secrets or the means by which the common purpose is to be accomplished. The evil scheme may be promoted by a few, some may drop out and some may join at a later stage, but the conspiracy continues until it is broken up. The conspiracy may develop in successive stages. There may be a general plan to accomplish the common design by such means as may from time to time be found expedient. New techniques may be invented and new means may be devised for advancement of the common plan."

17. In the case of Lennart Schussler and Another v. Director of Enforcement and Another 1970 Cri. L.J. 707 the Supreme Court observed :

> "The first of the offences defined in Section 120A, Penal Code which is itself punishable as a substantive offence is the very agreement between two or more persons to do or cause to be done an illegal act or legal act by illegal means subject however to the provision that where the agreement is not an agreement to commit an offence the agreement does not amount to a conspiracy unless it is followed up by an overt act done by one or more persons in pursuance of such an agreement. There must be a meeting of minds in the doing of the illegal act or the doing of a legal act by illegal means. If in the furtherance of the conspiracy certain persons are induced to do an unlawful act without the knowledge of the conspiracy of the plot they cannot be held to be conspirators, though they may be guilty of an offence pertaining is complete when two or more conspirators have agreed to do or cause to be done an act

> which is itself an offence, in which case no overt act need be established. An agreement to do an illegal act which amounts to a conspiracy will continue as long as the members of the conspiracy remain in agreement and as long as they are acting in accord and in furtherance of the object for which they entered into the agreement."

18. In Dr. Dattatraya Narayan Samant and Others v. State of Maharashtra, 1982 Cri. L.J. 1025 this Court had held :-

> "The most important ingredient of the offence of conspiracy is the agreement between two or more persons to do an illegal act. The illegal act may or may not be done in pursuance of the agreement, but the very agreement is an offence punishable under Section 120B of the Penal Code. Entering into an agreement by two or more persons to do an illegal act or legal act by illegal means and not merely an intention to do such acts constitutes the very quintessence of the offence of conspiracy."

19. In the case of Bachcha Babu and Others v. Emperor, AIR 1935 All. 162 it was held that evidence of association to be of any value for the prosecution should suggest something suspicious and from casual meeting or conversation in public place or park no inference, one way or the other, can be drawn regarding criminal conspiracy.

20. Now, so long as the case of Dr. Dattatraya, 1982, Cri. L.J. 1025 is concerned, it should be remembered that the proceedings were quashed on examination of the entire material which was available to this Court whereas in our case the entire material is still to come on record and, therefore, the authority cited by Mr. Desai can be distinguished from that point of view. As regards Allahabad case, I am afraid, the ruling may not help Mr. Desai at all because the facts and circumstances of our case do suggest something more than suspicion in the association of the accused persons and inferences are not sought to be drawn from casual meetings or conversation between the two parties in a public place or park where acquaintances frequently meet and talk. And so long as the judgments of the Supreme Court reported in Mohd. Hussain Umar Kochra, etc. v. K. S. Dalipsinghji and Another, 1970 Cri. L.J. 9 and Lennart Schussler and Another v. Director of Enforcement and Another, 1970 Cri. L.J. 707 are concerned, I do not think they can be of much help to Mr. Desai for the simple reason that the direct as well as circumstantial evidence pointing out to the positive facts of agreement of conspiracy may be well adduced at the time of the trial. All that has to be seen now is, whether the material mentioned in the complaint discloses or not that there are circumstances suggesting pre-arranged meeting of minds among the accused persons to do certain illegal acts or legal acts by illegal means. I am of the view that so long as the complaint in our case is concerned, there is enough material on the record to suggest criminal conspiracy on the part of the accused persons.

21. It is important to note here that in the case of Emperor v. Shafi Ahmed, Nabi Ahmed 31 BLR 515 this Court had pointed out that conspiracy is a matter of inference deduced from certain criminal purpose in common between them and although the common design is the root of the charge, it is not necessary to prove that two parties came together and actually agreed in terms to have this common design, and to persue it by common means and so to carry it into execution. It was also

pointed out in that case that it was not necessary to prove that that the conspirators actually met, nor it was necessary to show that they correspond or communicated in any way and there may be cases in which the Court will infer a conspiracy even though the defendants are unknown to each other.

22. Mr. Samant submitted that such a conspiracy and agreement was existing from 1-1-1981 as has been averred in the complaint itself and the other agreement in support of the conspiracy have been given in a parallel note wherein it has been shown conclusively that the continuing conspiracy which began on 1-1-1981 continued right up to 30-11-1985 and during this period, accused Nos. 8, 9 and 10 retired from the conspiracy on 19-10-1982 and 7-12-1982 but the conspiracy continued and the conspirators changed their techniques and resorted to various methods, viz., entering into warranty agreement, giving trade discount and collecting it back and also continuing with their earlier modus operandi. In this view of the matter, in my opinion, if all other accused persons who were associates of the present accused persons from 1-1-1981, continued to evade tax even after accuse Nos. 8, 9 and 10 retired, it could be a matter of inference that the tax evasion must be with a complete knowledge of all the conspirators, including those who retired. Such an inference is possible because tax evasion in this manner could not be done by the employees, however highly placed they may be, for their own benefit and the conclusion would be that the directing mind of the Directors must be associated with it. As could be seen from the facts mentioned hereinabove, even after the three Directors retired, a new technique was followed and the conspiracy continued for the entire period and the net result was the tax evasion in the order of more than rupees five crores.

23. Hence I find no substance in the argument of Mr. Desai that even if accused Nos. 8, 9 and 10 as Directors of the company were in some sense or the other incharge of and responsible for the conduct of the business of the company, no logical inference could be drawn that they had participated in a common design to evade payment of excise duty and that a bare theoretical possibility that the Directors may have met at some time or the other and unofficially talked over the matter which would only amount to a speculation and not an inference. Since this is a case of continuing I also do not find any substance in the submission of the learned counsel that one has to consider the conduct of accused Nos. 8, 9 and 10 only during the period when they were Directors. Further argument of the counsel that the modus operandi consisted of levying as surcharge over the price of goods for freight, insurance and handling charges and that these subjects never came up before the Board of Directors has also got to be rejected at this stage because whether such discussion came up before the Board of Directors or not is a matter of evidence and the prosecution cannot be shut out from leading such evidence.

24. Mr. Desai then submitted that the department has seized a cart-load of documents and there is not a single document pointed out by the complainant to attribute knowledge of the conspiracy of these accused persons and that since the minute book is referred to in the complaint, this Court should look into it for itself, if necessary. He relied upon a ruling of this Court in the case of Bomanji Kavasji Boman Behram and Others v. Mehernosh Minochar Mehta and Others, 1980 Bom. LR 503 to substantiate his argument that in the said case a Division Bench of this Court had looked into the documents referred to in the complaint. He also pointed out that while deciding Criminal Writ Petition No. 335 of 1986 Sharadchandra Shripad Marathe v. Gurushant Gangadhar Kamble of [1986

(25) ELT 915 (Bom.)] in this very matter my learned brother Puranik, J. had also looked into the certified copy of the record of the Registrar of Companies. I do not think, it is necessary at this stage to look into some of the documents on which the defence may rely to prove its innocence because all that is necessary is to find out whether there is prima facie evidence on the record for issue of process for which it is enough for this Court at this stage to look into the allegations made in the complaint. We may here usefully rely on a Supreme Court ruling in case of Smt. Nagawa v. Veeranna Shivalingappa Konjalgi and Others, in which case while quashing the order of issue of process, the Karnataka High Court had gone into the whole history of the case and had examined the merits of the evidence including the contradictions and what it called the imporbabilities and while discussing the matter in detail examined not only the materials produced before the Magistrate but also the documents which had been filed by the defence. The Supreme Court in that case observed :

> "The impugned order of the High Court proceeds on the basis that it was incumbent on the Magistrate to have considered the documents and their effect on the truth or falsehood of the allegations made by the complainant. This was an entirely wrong approach. As we are clearly of the opinion that the Magistrate was fully justified in completely excluding the documents from consideration.....".

I feel that in the Bombay cases referred to hereinabove, this judgment of the Supreme Court was perhaps not brought to the notice of the Division Bench and the learned single Judge.

25. Mr. Samant pointed out that a certain resolution passed by the Board of Directors on 14th December, 1983 would clearly indicate systematic activities pointing out clear-out conspiracy on the part of all the accused persons including accused Nos. 8, 9, 10 and 28. He referred to para No. 19 of the complaint which reads as under :-

> "The evidence collected during the investigation clearly shows that accused Nos. 1 to 30 were not quite happy with this object in view the Board of Directors passed resolution No. 64-2-049 on 14th December, 1983 which is highly significant. The relevant portion of the said resolution reads that with a view to obtaining benefits of excise duty concessions available to SSI Units, it is felt desirable and expedient to encourage manufacturing of hermetically sealed compressors to our design standard and know-how by small scale units in and around Karad under a licence agreement. It is significant that the said resolution was passed at the instance of accused No. 2. I say and submit that accused Nos. 1 to 30 being exercised over this taxation burden constituted several committees. One such committee was designated Law Committee consisting of C. S. Kirloskar, accused No. 3, S. R. Kher accused No. 4, a prominent solicitor and partner of a lending firm of solicitors in Bombay, and A. B. Pant, accused No. 11. The scope and functions of the said committee were to decide upon all legal matters in general and particularly with reference to the Companies Act. MRTP Act, Taxation laws, labour and industrial laws. I say and submit that the aforesaid resolution passed by the Board of Directors would indicate that accused No. 1 and accused Nos. 2 to 30 were aware of the problems only with this object in view that the Law Committee came to be constituted. This appointment of Law Committee

assumes great significance in the light of further important documents which were seized in the course of investigation."

26. In reply, Mr. Desai, stated that referring to this resolution by the complainant was a futile attempt at pointing out the alleged conspiracy on the part of all the accused persons. He submitted that this resolution only indicates that the Board of Directors did consider a problem concerning excise and this resolution became necessary by this date the company had become a Board managed company and there was no person like the Managing Director to take decision in a matter of day-to-day affairs of the company. Mr. Desai also submitted that it was pointed out that the matter was discussed in the context of a policy decision viz., whether in view of the relief to small scale industries in the matter of excise, the company could give licence to intending small units to manufacture the compressors and the discussion was on the basis of whether this could be done legally in the light of the new policy of the Government and that in no event, inference of conspiracy can be drawn that during the earlier period when accused Nos. 8, 9 and 10 were the Directors and when the management of the day-to-day affairs of the company was in the hands of the Managing Director and that a mere question of levying a surcharge was placed before the Board. Mr. Desai also urged that a company invites outsiders to be on the Board for technical guidance in the matter of law, accounts, engineering, etc., and financial institution also nominate their representatives on the Board. According to Mr. Desai, under the Companies Act, there has to be minimum quarterly meeting of the Board and at such Board meetings merely discussions of the policy issue take place and, therefore it would be impossible for the outside Directors to look into the day-to-day affairs of the company. Without making any observations about the submissions of Mr. Desai all that I would like to say here is that this seems to be the defence of the accused persons which they may very well take at the trial.

27. The next important aspect of the matter argued by Mr. Desai is the analysis of the provisions of Section 9 of the Act. With a view to appreciate the submissions of both the sides in this regard, it would be appropriate to state Section 9 of the Act here.

"9. (1) Whoever commits any of the following offences, namely :-

(a) contravenes any of the provisions of a notification issued under Section 6 or of Section 8, of a rule made under Clause (iii) of sub-section (2) of Section 37;

(b) evades the payment of any duty payable under this Act;

(bb) removes any excisable goods in contravention of any of the provisions of this Act or any rule made thereunder or in any way concerns himself with such removal;

(bbb) acquires possession of, or in any way concerns himself in transporting, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under this Act or any rule made thereunder.

(c) fails to supply any information which he is required by rules made under this Act to supply, or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information;

(d) attempts to commit, or abets the commission of, any of the offences mentioned in Clauses (a) and (b) of this section; shall be punishable -

(i) in the case of an offence relating to any excisable goods, the duty leviable thereon under this Act exceeds one lakhs of rupees, with imprisonment for a term which may extend to seven years and with fine;

Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court such imprisonment shall not be for a term of less than six months;

(ii) in any other case, with imprisonment for a term which may extend to three years or with fine or with both."

28. The argument of Mr. Desai is that without prejudice to the contention of the defence that no offence was committed under Section 9 of the Act, it may be noted that the offence under sub-sections 9(1)(bb), 9(1)(bbb) are not and cannot be alleged against the present accused persons as these sub-sections are in respect of positive activities which could be indulged in only human beings and that there are no averments to that effect vis-a-vis the present accused persons. Mr. Desai then submitted that sub-section 9(1)(b) deals with evasion of excise duty and this offence can be committed only by the persons who are liable to pay the duty and in that event the corporation who holds the manufacturing licence alone could be saddled with the liability of evasion of excise duty. Mr. Desai also submitted that it is true that the company acts through human beings and it was precisely for that reason that under sub-section 9(1)(d) abetment of evasion of duty is being made and human beings who enable the company to evade the payment of duty can be charged under sub-section 9(1)(d), i.e., for abatement. In further submission of Mr. Desai, sub-section 9(1)(d) applies only to sub-sections 9(1)(a) and 9(1)(b) and it does not apply to sub-sections 9(1)(bb) and 9(1)(bbb) for the obvious reasons that sub-sections 9(1)(a) and 9(1)(b) are the only offences which can be committed by the corporation and hence provision had to be made to penalise the human beings who enable the company to commit such offences. Mr. Desai lastly submitted that even the complaint proceeds on this footing as paragraphs 37 and 38 clearly indicate that the charge of evasion of excise duty is levelled against the company alone. To bring home this point he relied upon the case of The State v. S. P. Bhadani and Others . In that case, the company had failed to remit to the provident fund account the contribution of the employers and employees. The department prosecuted the Managing Director, Factory Manager and the Secretary of the company. Section 14A of the Employees' Provident Funds Act creates vicarious liability and despite that it was held that the officer of the company evisaged in sub-section (1) of Section 14A of the Employees' Provident Funds Act is the one who is in erect management of the affairs of the company and thus 2 out of the 3 accused persons were acquitted. Mr. Desai submitted that in the said case the evasion to pay the contribution to the fund was by the company and did not attract penal liability against all the Directors. He also relied upon a ruling of Allahabad High Court in case of R. K. Khandelwal and

Another v. State, 1965 (2) Cri. L.J. 439 in which it was held :

> "No director or partner of a company can be convicted of the offence under Section 27 of the Drugs Act unless it is proved that the sub-standard drug was sold with his consent or connivance or was attributable to any neglect on his part, or it is proved that he was a person in charge of, and responsible to the company for the conduct of the business of the company."

And still one more relied upon by Mr. Desai is the State of Karnataka v. Pratap Chand and others, [1981] 128 ITR 573 in which it was held :

> "A partner is liable to be convicted for an offence committed by the firm if he was in charge of an responsible to the firm for the conduct of the business of the firm or if it is proved that the offence was committed with the consent or connivance of, or was attributable to any neglect on the part of, the partner concerned. A person 'in charge' must mean that the person should be in overall control of the day to day business of the firm."

And lastly he relied upon a Calcutta High Court ruling in case of Bhagwati Prasad Khaitan v. The Special Director, Enforcement Directorate and Another, 1977 Cri. L.J. 1821 in which it was held :

> "In order to be made vicariously liable the person must be shown to have been a person who was in charge of or was responsible to the company for the conduct of the business of the company. The director simpliciter as such cannot be said to be person who was in charge of and was responsible to the company for the conduct of its business."

29. I am afraid, neither the way in which Section 9 is analysed by Mr. Desai nor the various rulings referred to and relied upon by him can be of any held to his clients for the simple reason that even a bare look at Section 9 shows that the offence is punishable both with imprisonment and fine. Therefore, it is wrong to assume that only the company is liable and others are not because the company cannot be sent to jail. For the contravention of any of the provisions of the Act, if the company alone was liable, the legislature would not have provided for the punishment as any way of imprisonment as well as fine. If the excise duty is evaded by the company, in my opinion, not only the company but also the persons who committed or conspired to commit such offence would be liable under Section 9 as also all those who aided and abetted the commission of such an offence whether Director/s, Secretary or any other persons/s in the company or outside the company who aided and abetted the commission of such offence. The company can be punished by imposing fine on it and the human being both fine and imprisonment. If on proper evidence the Court is satisfied that certain persons did conspire to commit the offence of tax evasion and but for such conspiracy no tax evasion could take place, all those who entered into such unlawful agreement would be liable under Section 120B of the Indian Penal Code read with Section 9 of the Act. And when tax evasion in fact does take place in consequence of such conspiracy, they could be held liable under Section 9 of the Act read with Section 120B of the Indian Penal Code. Who actually was in charge of the

company, who actually was responsible to the company, who actually was the brain behind the commission of an offence and whether it was a Director "simpliciter" occupying an innocuous position or otherwise would depend upon the evidence and in my opinion in a case like this the prosecution should be given an opportunity to lead complete evidence and its case cannot be shut out by granting the relief such as the one asked for in these petitions. There is lot of substance in the submission of Mr. Desai that the corporation is a legal and juristic entity and that the Board of Directors is not equivalent to a corporation and every Director individually is nobody vis-a-vis the company and that the Directors can act only jointly at a Board meeting. It is also true that evasion of duty by a corporation does not automatically attract the penal liability to the Directors in the absence of Section 9AA of the Act. But in our case the Directors are sought to be penalised as such. Mr. Samant has repeatedly urged that in this case the Directors are not sought to be penalised on the principle of vicarious liability as provided under Section 9AA of the Act.

30. In addition to the submissions of Mr. Samant that in our case the Directors are not sought to be penalised for the criminal acts with the help of Section 9AA of the Act, it is also important to note the observations of the Supreme Court in the case of the Juggilal Kamlapat v. Commissioner of Income-tax, U.P. that :

> "The Court is entitled to lift the mask of corporate entity if the conception is used for tax evasion or to circumvent tax obligation or to perpetrate fruad."

The Supreme Court further observed :

> "It is true that from juristic point of view the company is a legal personality entirely distinct from its members and the company is capable of enjoying rights and being subjected to duties which are not the same as those enjoyed or borne by its members. But in certain exceptional cases the Court is entitled to lift the veil of corporate entity and to pay regard to the economic realities behind the legal facade."

To controvert the submission of Mr. Samant about the lifting of the corporate veil, Mr. Desai submitted that this is relevant in civil and revenue law and has no application in criminal law. According to him, it is only to find out, who is the real owner and so long as the Directors are concerned, they are known to one and all there is no necessity to lift the veil. To substantiate his argument, he invited my attention to a passage from Palmer's Company Law, Vol. I, 1982 Edition, on page 201;

> "It may be convenient to list briefly the main instances in which modern company law disregards the principle that the company is an independent legal entity. Generally speaking, the Courts are more inclined, in appropriate circumstances, to 'lift the veli' of corporateness where questions of control are in issue than where a question of ownership arises."

However, it is important to note that in the same book on page 202 it has also been observed :

> "The Courts have further shown themselves willing to 'lift the veil' where the device of incorporation is used for some illegal or improper purpose."

The observations of the Supreme Court, as above, are intended to apply to cases where the corporate entity is used for evasion of tax or to circumvent the tax obligation or to perpetuate fraud and these observations underline a very important aspect of the matter that the Court has to pay regard to the economic realities behind the legal facade. The economic realities behind the legal facade are that the company works only through human beings and everything that is done by the company is done by the human beings. Therefore, the evasion of excise duty in our case to the tune of more than rupees five crores could not have been done without the knowledge and active acquiescence of the Directors, in the prepetuation of this fund.

31. As regard accused No. 28, the submission of Mr. Desai is that he performs only statutory functions under the Companies Act as under :-

> "Section 75 - Delivering for registration returns of allotments, and contracts relating to allotment of shares for consideration other than cash;
>
> Section 97 - Giving notice to the Registrar of an increase of share capital;
>
> Section 113 - Issuing certificates of shares, debentures and debenture stock;
>
> Section 118 - Allowing inspection of the debenture register;
>
> Sections 125 to 127 - Delivering particulars of mortgages and charges for registration;
>
> Section 149 - Making the statutory declaration for commencement of business;
>
> Section 160, 161 and 162 - Signing the annual return and certifying the documents annexed thereto;
>
> Section 163 - Allowing inspection of and furnishing copies of register of members;
>
> Section 304 - Allowing inspection of the register of directors;
>
> Section 322 - Where a director's liability is made unlimited, giving the notice required to be given to him;
>
> Section 383A - Certain companies to have Secretaries;
>
> Section 454 - Assisting in the making of the statement of affairs of the company, in a winding up.

> The duty to maintain the several registers required to be maintained under several sections of the Act and the duty to send notices of Board Meeting and General Meetings are also some of his more important duties."

Mr. Desai also brought to my notice the commentaries on the Principles of Modern Company Law by L.C.B. Gower, Fourth Edition, at page 157 and submitted that :

> "Speaking generally a Secretary's functions are purely ministerial and administrative and he is not, as Secretary, charged with the exercise of any managerial powers."

And further that :

> "the Secretary is not concerned in the management of the company..... He is not concerned in carrying on the business of the company."

Mr. Desai emphasised that thus the Secretary is not in day-to-day charge of the business of the company and cannot be held liable for tax evasion by the company, if any. The answer to Mr. Desai's contention can be had from the same book on pages 158 and 159 as under :-

> "But times have changed. A Company Secretary is a much more important person nowadays than he was in 1887. He is an officer of the company with extensive duties and responsibilities. This appears not only in the modern Companies Acts, but also by the role which he plays in the day-to-day business of companies. He is no longer a mere clerk. He regularly makes representations on behalf of the company and enters into contracts on its behalf which come within the day-to-day running of the company's business."

We may also usefully quote here the observations of the Supreme Court in [the] case of R. S. Nayak v. A. R. Antulay and Another , that the superior's direction is no defence in respect of criminal acts, as every officer is bound to act according to law and is not entitled to protection of a superior's direction as a defence in the matter of commission of a crime. So long as our case in concerned, accused No. 28 still continues to be the Secretary of the company and there are averments No. 1-company for the conduct of its business and his claim that he cannot be saddled with liability of tax evasion because he was doing his statutory duty is not tenable.

32. Mr. Desai then submitted that the liability to pay the excise duty is of the corporation only as can be seen from the scheme of the Act and the Rules framed thereunder which shows that the duties are payable by the manufacturer or the producer which has to obtain the licence an advance and in our case it is accused No. 1-company who has such a licence. In this respect, he invited my attention to Sections 11 and 11A of the Act and Rules 9, 173Q and 221. In my opinion, this attempt on the part of Mr. Desai would only widen the scope of his arguments on the instant matter for quashing the process issued by the Magistrate because these provisions of law obtain only under adjudication proceedings which are in the nature of revenge recovery proceedings and do not partake the character of criminal proceedings. Let it be said here that those considerations which obtain for

adjudication proceedings could not possibly have anything to do with the criminal proceedings.

33. The last limb of the argument of Mr. Desai is that it would be in the interest of justice that this Court exercises its inherent powers under Section 482 of the Criminal Procedure Code to prevent the abuse of process of law. In the submission of Mr. Desai, the first and foremost requirement for issue of process is sufficient ground for proceeding and this ground should not be just bare or nebulous, as sufficient means adequate. It should be something more than reasonable and the burden is on the complainant to establish the sufficiency of ground and the Magistrate has to be satisfied about sufficiency before issue of process, further submitted by Mr. Desai. He then contended that sufficiency of ground means a prima facie case and a mere statement is not a prima facie case as such statement has to be supported by something more. He also urged that although it is observed by the Supreme Court in various cases that powers of quashing should be sparingly exercised, it is equally emphasised that where quashing is called for, it should not be spared on the ground that the person will have an opportunity to meet the case and get his final deliverance before the Magistrate. Mr. Desai also contended that the whole object of quashing is not to secure acquittal but to avoid injustice, inconvenience, harassment and personal reflection case upon a persons as an accused in a given case. Quashing deals with justice and not mere ends of law, further contended Mr. Desai. In support of his arguments, he relied upon State of Karnataka v. L. Muniswamy and Others , Kedarnath Goenka and Others v. Superintendent of Central Excise and Others 1978 (2) ELT (J 538), Ramesh Inder Singh v. M. S. Gill 1984 (18) ELT 181 (P & H) = 1984 ECR 2343 (P & H), Municipal Corporation of Delhi v. Ram Kishan Rohtagi and Others , R. P. Kapur v. State of Punjab , Criminal Writ Petition No. 335 of 1986 decided by this Court (Puranik, J.) on 24th July, 1986 [Sharadchandra Shripad Marathe v. Gurushant Gangadhar Kamble 1986 (25) ELT 915 (Bom.)], Criminal Writ Petition Nos. 335 and 219 of 1986 decided by this Court (Puranik, J.) on 18th August, 1986.

34. A perusal of all these cases shows that they were decided in the facts and circumstances obtaining in each of the case. In , there was no material on the record on the basis of which any tribunal could reasonably come to the conclusion that the accused were in any manner connected with the incident leading to the prosecution. In 1978 (2) ELT (J 538), the complaint taken at its face value did not make out a prima facie case against the petitioners or opposite party No. 3. In 1984 (18) ELT 181 (P & H) = 1984 ECR 2343 (P & H), in the absence of any specific allegations against the Directors of the company, they could not be held liable. In , so far as the Directors were concerned, there was not even a whisper nor a shred of evidence nor anything to show apart from the presumption drawn by the complainant that there is any act committed by them from which a reasonable inference could be drawn that they could be vicariously held liable. In , the Supreme Court explained the principles governing the inherent powers of the High Court under Section 561A of the old Criminal Procedure Code, but refused to quash the proceedings in the facts of the case as no case had been made out for quashing by the appellant. Writ Petition Nos. 335 and 219 of 1986, arose from the present case itself and then my learned brother Puranik, J. quashed the proceedings on the ground that the petitioner in Writ Petition No. 335 of 1986 [Sharadchandra Shripad Marathe v. Gurushant Gangadhar Kamble (supra)] had joined the company as a Director only on 19th November, 1985, a few days before the raid was effected and had not participated in any of the earlier proceedings leading to the conspiracy and in Writ Petition No. 219 of 1986, he was of the

opinion that the petitioner had nothing to do with conspiracy from 30-9-1983. There is no quarrel and can never be one about the legal propositions made by Mr. Desai as enunciated in the above judgment but regard being had to the facts and circumstances of the instant case. I am of the view that the accused Nos. 8, 9, 10 and 28 have not made out case for quashing the proceedings.

35. Mr. Samant strongly relied upon the observations made Municipal Corporation of Delhi v. Ram Kishan Rohtagi and Other , Municipal Corporation of Delhi v. Purshottam Dass Jhunjhunwala and Others and J. P. Sharma v. Vinod Kumar Jain and Others , on this aspect of the matter. He submitted that on the basis of the averments made in the complaint, process was issued and the rest is a matter of evidence that would be adduced when the trial beings. He further submitted that the drift and the tenor of the complaint read as a whole would show that the complaint is based on the results of investigation which point out that the present accused persons were in league with the company in the matter of evasion of excise duty. He drew my attention to a paragraph from the case of Ram Kishan Rohtagi that :

> "It is, therefore, manifestly clear the proceedings against an accused in the initial stages can be quashed only if on the face of the complaint or the papers accompanying the same, no offence is constituted. In other words, the test is that taking the allegations and the complaint as they are, without adding or subtracting anything, if no offence is made out then the High Court will be justified in quashing the proceedings in exercise of its powers under Section 482 of the present Code."

Let it be noted here that at this stage we are not concerned with the truth or otherwise of the allegations made in the complaint which would be investigated at the time of the trial. In my opinion, there is enough material on the record to show that the present accused persons in conspiracy with others were parties to the evasion of excise duty and on the basis of the averments made in the complaint, the learned Chief Judicial Magistrate, Pune, issued process because prima facie this was a fit case for issuing process. The impugned order of the Magistrate, therefore, suffers from no legal infirmity and I see no good reasons to quash the proceedings taken against accused Nos. 8, 9, 10 and 28.

36. I would better conclude this judgment by quoting the observations made by the Supreme Court in the case of State of Maharashtra v. Champalal Punjabi Shah that :

> "It is one of the said and distressing features of our criminal justice system that an accused person, resolutely minded to delay the day of reckoning, may quite conveniently and comfortably do so, if he can but afford the cost involved, by journeying back and forth, between the Court of first instance and the superior Courts, at frequent interlocutory stages. Applications abound to quash investigations, complaints and charges on all imaginable grounds, depending on the ingenuity of client and counsel. Not infrequently, as soon as a Court takes cognizance of a case requiring sanction or consent to prosecute, the sanction or consent is questioned as improperly accorded, as soon as a witness is examined or a document produced, the evidence is challenged as illegally received and many of them are taken up to the

> High Court and some of them reach this Court too on the theory that 'it goes to the root of the matter'. There are always petitions alleging 'assuming the entire prosecution case to be true, no offence is made out'. And, inevitably proceedings are stayed and trials delayed. Delay is a known defence tactic."

37. In the premises of the above discussion, rule in both the writ petitions is discharged. Stay vacated.

38. At this stage, Mr. Desai makes an oral application that leave be granted to file an appeal in the Supreme Court. As this judgment is based on settled principles of law laid down by the Supreme Court, I do not feel it necessary to grant such leave. The oral application stands rejected.