

Before the Hon'ble Supreme Court of Aharat
(Under Art. 32 read with Art. 136 of the Constitution of Aharat)

IN THE MATTER OF:

MUSKLA AND ORS.

(PETITIONER-APPELLANT)

V.

UNION OF AHARAT

(DEFENDANT-RESPONDENT)

Memorial filed on behalf of the Defendant-Respondent

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LIST OF ABBREVIATIONS

§	Section
¶	Paragraph
¶¶	Paragraphs
AI	Artificial Intelligence
AIR	All India Reporter
App.	Appeal
Art.	Article
CEO	Chief Executive Officer
Co.	Company
Const.	Constitution
CPA	Consumer Protection Act
GoA	Government of Aharat
Govt.	Government
HC	High Court
HAD	High Driving Automation
Inc.	Incorporation
IPC	Indian Penal Code
ISP	Internet Service Provider
IT Act	Information Technology Act
LCI	Law Commission of India
MVA	Motor Vehicle Act
SC	Supreme Court
U.S.A	United States of America
u/s	Under section

Anr.	Another
C.J	Chief Justice
Cal	Calcutta
D.O.	Designated Officer
EU	European Union
i.e;	That is
Ind.	India
Ltd.	Limited
No.	Number
Ors.	Others
Para	Paragraph
Pvt.	Private
P.C	Penal Code
SCC	Supreme Court Cases
Sec.	Section
u/art.	Under article
UOI	Union of India
v.	Versus

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STATEMENT OF JURISDICTION

The Petitioner-Appellant has moved to the Hon'ble Supreme Court of Aharat under Art. 32 of the Constitution of Aharat in the matter of revoking the ban on M's firmware. The relevant provision is reproduced below:

Art. 32. Remedies for enforcement of rights conferred by this Part

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed

Further, the Petitioner-Appellant has approached the Hon'ble Supreme Court of Aharat to hear the matter of High Court rejecting the petition to quash the criminal cases registered against the petitioners under Art. 136 of the Constitution of Aharat. The relevant provision is reproduced below:

Art. 136. Special leave to appeal by the Supreme Court

(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India

The Defendant-Respondent humbly and respectfully submits to the jurisdiction of this Hon'ble Court.

STATEMENT OF FACTS

Muskla, a company based in USA specializing in e-mobility vehicles intends to launch its car M, equipped with Level 4 HDA in Aharat. Aharat refused approval to use auto-pilot as Muskla has an unsuitable non-local dataset, and it requires the amendment of the MVA. Muskla incorporated a subsidiary Muskla Aharat for the sale of cars and restricted the add-on feature of auto-pilot in Aharat. The end-users entered into an agreement with Muskla Inc. that any usage of auto-pilot in prohibited countries could make usage of their M suspended. The launch event turned out to be controversial due to a statement by its CEO Melon Dusk - allegedly insinuating the exploitation of known vulnerabilities to access auto-pilot in the country. Dusk tweeted an explanation and later Muskla fixed the vulnerability within six months.

In Nov 2021, one Kim Veersingha tweeted about a hack providing access to the auto-pilot feature for ~2 hours. The tweet was liked by Dusk. Later in March '22, she met with an accident killing two people while livestreaming the hack. While Muskla intervened to restrict automation remotely, it was late. Criminal proceedings were initiated against Kim for reckless driving. Muskla fixed the vulnerability within 10 days, and geo-blocked auto-pilot use in non-white countries.

In the meanwhile, Aharat Times leaked an internal memo which showed that Dusk silently encouraged use of the auto-pilot feature and that ~70% Aharat cars have already accessed the feature. GoA banned the M firmware server access, and the M app u/S. 69A. A criminal case was registered against Dusk and the Dhanraj, CEO of Muskla Aharat under 304A of IPC and u/S. 188, read with 184, 190 and 198 of the MVA. The CEO was arrested, while Dusk's whereabouts were unknown. The GoA intends to press for Dusk's extradition. Muskla & its subsidiary moved to SC to revoke the ban. Muskla, Dhanraj, Dusk also moved to the HC to quash criminal case. They have now moved the SC challenging the HC Order. The Hon'ble SC hereby combined both the petitions.

STATEMENT OF ISSUES

- I. Whether the government of Aharat's ban order prohibiting M's firmware or M's app to access its server maintained by Muskla Inc by connecting to the internet within Aharat is valid under section 69A of the IT Act?
- II. Whether Muskla Inc. and Muskla Aharat can be termed as intermediaries under the 79 of the IT Act?
- III. Whether Muskla Inc., Muskla Aharat can claim any immunity from prosecution under the Penal Code and Motor Vehicles Act?
- IV. If the above issue is answered positively, then can Dusk and Dhanraj also claim immunity from prosecution, given that they are just officers of Muskla Inc. and Muskla Aharat respectively?

SUMMARY OF ARGUMENTS

Issue 1: Whether the government of Aharat's ban order prohibiting M's firmware or M's app to access its server maintained by Muskla Inc by connecting to the internet within Aharat is valid under section 69A of the IT Act?

The decision of the GoA was necessary owing to the urgency of the situation that forty thousand models of M had been sold. There was no violation of Natural Justice as it can be excluded when such principle delays prompt action i.e. it is subject to the doctrine of necessity. The ban is both necessary and proportionate. Furthermore, the petitioner-appellant has suppressed the fact that they had ample time to rectify the vulnerability i.e., they have not approached the court with clean hands.

Issue 2: Whether Muskla Inc. and Muskla Aharat can be termed as intermediaries under the 79 of the IT Act?

Muskla Inc. and Muskla Aharat are not Intermediaries within the meaning of the Section 79 of the IT Act, 2000 on following grounds: The entities themselves are the creator and consumer of information and hence fall out of the definition laid out under Section 2(w) of the act. They also do not satisfy the characteristics of an intermediary set out in Section 79(2) of the Act.

Assuming the entities to be Intermediary even then they are not entitled for Section 79 exemptions as: They are not passive intermediaries but an active one, and the protection is merely available to the former. They have floundered their due diligence requirement under Section 79(3) and have abetted in criminal acts.

Issue 3: Whether Muskla Inc., Muskla Aharat can claim any immunity from prosecution under the Penal Code and Motor Vehicles Act?

Neither Muskla Inc. nor Muskla Aharat can claim immunity under Penal code due to the application of attribution principle. The petitioner has filed the criminal case under sec. 304A of the Penal code against the CEOs of both the companies and both being the directing minds of the company, company becomes the necessary party to get impleaded and can't evade prosecution. In the absence of any provision under the penal code providing immunity to the corporation for relevant actions, the companies cannot claim immunity under the Penal code.

In furtherance, both the companies can't claim any immunity under MV Act on the ground that the act doesn't cover automated cars and hence no such immunity has been provided under the same. The company being the manufacturer is the actual controller of the automated system being AI in its cars. The company provided the defected cars and even after being aware of the vulnerability did nothing to cure the same and hence abetted Miss Kim in violating the provisions of MV Act.

Issue 4: If the above issue is answered positively, then can Dusk and Dhanraj also claim immunity from prosecution, given that they are just officers of Muskla Inc. and Muskla Aharat respectively?

Mr. Dusk and Mr. Dhanraj can't claim immunity from prosecution applying the principle of directing mind, piercing of corporate veil and joint liability. It is now a well settled principle that to make the real culprits liable hiding behind the veil of the company, the veil can be pierced. As the company has no brain of itself its officers are the one actually executing the actions. The company and its officers can be made jointly liable. Hence there is no such immunity to the CEOs from prosecution to evade their personal liability.

ARGUMENTS ADVANCED

I. Whether the government of Aharat’s ban order prohibiting M’s firmware or M’s app to access its server maintained by Muskla is valid under section 69A of the IT Act?

§ 69A¹ imposes restrictions on freedom of speech and expression which are **akin to the restrictions under Art. 19(2)**.² Upholding the constitutional validity, the Apex court held that §69A can be invoked³: if the Central Govt, is “satisfied” that it is **necessary or expedient** to do so, such necessity or expediency has a **nexus** with grounds mentioned under **Art. 19(2), Reasons are to be recorded** in writing so that they may be assailed in a writ petition under Art. 226. ¶ 1

In this case, **40,000 models of ‘M’** had already been sold in Aharat and the info was in the public domain that **70% of them had at least once used the autopilot feature**⁴. Any delay was fatal and it was necessary or expedient for the Govt. to take such action. ¶ 2

Emphasis is laid on the fact that M’s firmware was known for its vulnerability despite which no timely action was taken. **The timeline of events is-Ms Kim first flaunted** the extension of autopilot up to 2 hours in **Nov 2021** and the post was liked i.e., the vulnerability was brought to the knowledge of Mr Dusk. Despite this, no action was taken to rectify the vulnerability **till the next 4 months** but was **rectified within 10 days** after the accident. This malice of Muskla reveals the laxity and breach of duty on their part where the true intent was to polish the technology at the cost of the lives of the citizens of Aharat. ¶ 3

¹ Information Technology Act, 2000, §69 A, No. 21, Acts of Parliament, 2000 (India)

² Agij Promotion of Nineteenonea Media Pvt. Ltd. and Ors. vs. Union of India and Ors. (14.08.2021 - BOMHC) : MANU/MH/2191/2021

³ Shreya Singhal v UOI AIR 2015 SC 1523

⁴ Yashwant Sinha v. CBI, (2020) 2 SCC 392 (1)

The law in India and England considers the relevancy of the material. The fact of it was obtained in **an improper manner is immaterial**⁵. The **leaked memo** by Aharat Times strengthens the malicious intent of Petitioners. Being relevant to the case the memo must be considered⁶. ¶ 4

The entire stance is corroborated by the statements given by Mr. Dusk during the launch event.

यद्यदाचरति श्रेष्ठस्तत्तदेवेतरो जनः । स यत्प्रमाणं कुरुते लोकस्तदनुवर्तते ॥ This shloka states-

whatever action is performed by a leader; common men follow in his footsteps. "**With great power comes great responsibilities**"⁷. Thus, it does not befit Mr. Dusk to indulge in acts that can encourage the buyers to hack the autopilot mode disrupting the public order. ¶ 5

Further **invoking Sec. 69A (2) r/w Sec. 87 (2)(z)**, 2009 IT Blocking Rules⁸ were made under which blocking can be done in normal and in emergency cases. **In emergency cases under Rule 9**, blocking is done without giving opportunity for a hearing but with adequate safeguards⁹. The D.O shall, not later than 48 hours of the issue of the interim direction, bring the request before the Committee of Govt. Personnel. Only on Committee's recommendation can the Secretary, IT pass the final order. Under Rule 14, Review Committee shall examine if the directions are in accordance with Sec 69A. Therefore, the **discretion vested** in the Central Govt. **is not arbitrary** but guided by reasonable safeguards¹⁰. This "**Theory of Guided Power**" justifies the act of the Govt¹¹. ¶ 6

Natural Justice Not Violated

⁵ Yashwant Sinha v. CBI, (2020) 2 SCC 392 (1)

⁶ ibid

⁷ Brinda Karat and Ors. vs. State of NCT of Delhi and Ors. (13.06.2022 - DELHC): MANU/DE/2161/2022

⁸ The Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009

⁹ Shreya Singhal v UOI AIR 2015 SC 1523

¹⁰ M. Nagraj v UOI (2006) 8 SCC 212

¹¹ M. Nagraj v UOI (2006) 8 SCC 212

Natural Justice or “*fair play in action*”¹² is a great humanizing principle intended to invest in fairness and secure justice¹³. Where there is the power to decide, the duty to act judicially is present¹⁴. *Audi alteram partem* is an essential feature of natural justice¹⁵. However, the obligation to provide notice or hearing **can be excluded where it would obstruct prompt action**¹⁶. ¶ 7

The object and the scheme of 69A and Rule 9 warrant such exclusion. Such exceptions **do not obliterate natural justice** as the word “exception” is just a misnomer. This is because in emergency cases, this principle cannot be applied to make the law “lifeless, self-defeating”. “*Life of law is not logic but experience*¹⁷”, thus each legal proposition is to be tested on the grounds of pragmatic realism¹⁸. Rules of natural justice cannot be cast into rigid moulds and **can be modified by statutes**¹⁹. Thus, these rules are **subject to the doctrine of necessity** and yield to it²⁰. This right here had the effect of paralyzing the administrative process. ¶ 8

Test of Proportionality Fulfilled

This test has two prongs- 1. **Balancing Test** which scrutinizes the nexus between the object sought and achieved, 2. **Necessity Test** requires human rights infringement to be the least restrictive

¹² Schmidt v Secretary of State of Home Affairs [1969] 2 Ch. 149

¹³ Wiseman v Borneman [1969] 3 WLR 706, Maneka Gandhi v UOI AIR 1978 SC 597

¹⁴ Ridge v Baldwin [1964] AC 40, Associated Cement Companies Ltd v P N Sharma (1965) AIR 1595, State of Orrisa v Dr. Binapani Dei (1967) AIR 1269

¹⁵ Russel v. Duke of Norfolk [1949] 1 All ER 109

¹⁶ S. A. de Smith *Judicial Review of Administrative Action*, (2nd edn) 174; Maneka Gandhi v UOI AIR 1978 SC 597; J. Mohapatra & Co. v. State of Orissa, (1984) 4 SCC 103

¹⁷ Concerning the Relation of Logic to Law, 24 JILI (1982) 234 <https://www.jstor.org/stable/43952205>

¹⁸ Maneka Gandhi v UOI AIR 1978 SC 597

¹⁹ Union of India v. Tulsiram Patel, (1985) 3 SCC 398; Union of India v. Col. J. N. Sinha (1970) 2 SCC 458; Mohinder Singh Gill v. Chief Election Commr., (1978) 1 SCC 405; Swadeshi Cotton Mills v. Union of India, (1981) 1 SCC 664

²⁰ Suresh Koshy George v. University of Kerala, (1969) 1 SCR 315; Hira Nath Mishra v. Principal, Rajendra Medical College AIR 1973 SC 1260

alternative²¹²². In the present case, the petitioners **despite the knowledge of a major vulnerability took no action** to rectify it. Considering the urgency of the situation, the ban was both necessary and proportionate. ¶ 9

Doctrine of Clean Hands Applicable

“Those who seek equity must approach the court with clean hands²³”. The petitioners here have a duty to act in a fair and equitable manner which has not been fulfilled as they have acted with a malafide intention. Despite having 4 months to perfect the lacunas, they kept quiet. This establishes that they have **no respect for truth** and are merely trying to **pollute the stream of justice by suppressing these facts²⁴**. The laxity²⁵ on part of Muskla is certainly actionable. ¶ 10

II. Whether Muskla Inc. and Muskla Aharat can be termed as intermediaries under the Section 79 of the IT Act?

A. Muskla is not a mere Intermediary under Section 79 of Information Technology Act

The term ‘Intermediary’ is defined in §2(w)²⁶ of the Act, and it reads: § 2 (w): *“intermediary, with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits...”* An intermediary does not create any information by itself but only receives, stores and transmits the information created or posted by users i.e., third parties. The

²¹ Coimbatore District Central Cooperative Bank v. Coimbatore District Central Coop Bank Employees Assn. (2007) 4 SCC 669, Anuradha Bhasin v. Union of India, (2020) 3 SCC 637

²² Chintaman Rao v State of M.P. AIR 1951 SC 118; Halsbury’s Laws of England (4th Edn.), Reissue, Vol 1(1), para 78

²³ Ram saran v IG of Police, CRPF & ors. (2006) 2 SCC 541, Hari Narain v. Badri Das AIR 1963 SC 1558; Ramjas Foundation v. UOI & Ors (2010) 14 SCC 38

²⁴ Ramjas Foundation v. UOI & Ors (2010) 14 SCC 38

²⁵ Information Technology Act, 2000, §43A, No. 21, Acts of Parliament, 2000 (India)

²⁶ Information Technology Act, 2000, §2, No. 21, Acts of Parliament, 2000 (India)

intermediary does not:²⁷ **initiate** the transmission, select who receives the transmission, or select or **modify** the information contained in the transmission. ¶ 11

Muskla Inc. and Muskla Aharat in this case:

1. Act as a single entity for the transmission of information and there is no intermediary platform involved that acts as a mutual point of exchange for information;
2. Initiates and decides who receives the information through manual or automatic programs, and, modify the information generated from M and only collect those necessary for the operation of M and training of its AI systems for auto-pilot.

On these grounds, it is clearly discernible that Muskla Inc. or, Muskla Aharat cannot be termed as an intermediary, since even though they are involved in the transmission of information, they themselves are the originator and consumer of that information. ¶ 12

B. Muskla Inc and Muskla Aharat assuming to be Intermediaries, do not qualify under exemptions of Section 79

1) Is not a passive participant in Transaction: Following the 2008 amendment, whether an intermediary could claim **safe harbour** hinged largely on two factors i.e., **actual knowledge** about the unlawful act and **compliance** with due diligence obligations, as prescribed. Notably, the Supreme Court in the **Shreya Singhal**²⁸ judgment, read down “actual knowledge” when there is a court order or notification from an appropriate government authority. Prior to the amendment, S.

²⁷ Information Technology Act, 2000, §79, No. 21, Acts of Parliament, 2000 (India)

²⁸ Shreya Singhal v UOI AIR 2015 SC 1523

79 of the act provided immunity to ISPs only with respect to liability arising from the IT Act, 2000 and there was absolutely no protection from liability under other legislations.²⁹ ¶ 13

With the amendment of 2008, §2(w) and §79 were altered to create a **safe harbour** provision for intermediaries. An intermediary, now, would not be liable for any third-party information, data or communication link made available/hosted by it. Borrowed from **Art. 12 of the EU Directive**³⁰, stating that the ISP should be providing services of a passive or automatic nature hence **acting as a mere conduit to the information** but not serving any controlling function in its creation or dissemination. The EU Directive stresses particularly on the **absence of modification of the information** contained in the transmission as condition precedent to availing the safe harbor. ¶ 14

The Supreme Court³¹ has also observed this is hard to judge the genuine request from millions of them³² but this extends only to those instances where the intermediary **merely acts as a facilitator and is not involved in the creation or modification of the data or information as recently clarified by the Supreme Court**³³ The Delhi H.C³⁴, also clarified in that the safe harbour provision under Section 79 is applicable only to **“passive intermediaries”**. It even provided an exhaustive list of various functions that may be performed by an intermediary and claimed that the more functions an intermediary performs the more it is likely to be termed an **“active participant”**. ¶ 15

²⁹ Chinmayi Arun, “Gatekeeper liability and article 19(1)(A) of the Constitution of India” (2015) NUJS Law Review

³⁰ E-Commerce Directive 2000/31/EC Article 12(2).

³¹ Shreya Singhal v. Union of India [(2015) 5 SCC 1]

³² Kent Ro Systems Ltd. v. Amit Kotak. [(2017) 69 PTC 551]

³³ Google India Pvt. Ltd. v. Visakha Industries [(2020) 4 SCC 162.

³⁴ Christain Louboutin SAS v. Nakul Bajaj, [CS(COMM) 344/2018]

In this case, Muskla Inc. through its act, control over the transaction is clearly an active participant between the M, Users and itself, and hence it is humbly submitted before the Hon'ble Court that the safe harbour provision of §79, would not be available to them. ¶ 16

2) Muskla Inc, and Muskla Aharat had due knowledge of the specific vulnerability that led

to the accident: Further, it is humbly submitted that § 79(2)(c)³⁵ and subsection 3(b)³⁶ place a premium on due diligence and real information. Due diligence is described by the Oxford dictionary as “reasonable action taken by an individual or an entity to prevent committing a tort or an offence.” §79, paragraph (3)(a), adds that the intermediary does not **conspire, partake in, or abet the commission of some criminal act.** ¶ 17

Abetment is defined in §107³⁷ of the IPC and clause (c) reads: “*Abetment of a thing. —A person abets the doing of a thing, who - ... (c) Intentionally aids, by any act or illegal omission, the doing of that thing.*” A person is said to be abetting when he/she facilitates another person by **way of assistance or supply of materials or something else.**³⁸ The entities in the present case by:

- a. Willful ignorance of the known vulnerabilities present in M,
- b. Promoting illegal exploitation and exploration of vulnerabilities to bypass the unavailability of HDA through the action of its founder during launch, and on social media.

It is humbly contested that Muskla Inc, and Muskla Aharat in order to collect data on Aharat's Citizens to polish their Artificial Intelligence networks and Automated Driving Systems:

³⁵ Information Technology Act, 2000, §79, No. 21, Acts of Parliament, 2000 (India)

³⁶ Information Technology Act, 2000, §79, No. 21, Acts of Parliament, 2000 (India)

³⁷ Indian Penal Code, 1860, §107, No. 45, Acts of Parliament, 1860 (India)

³⁸ Ram Kumar v State of Himachal Pradesh AIR 1995 SC 1965

- a. Abetted the illegal act by intentionally omitting its duty to put a stop to vulnerabilities speedily, threatening the lives of citizens of Aharat,
- b. Abetted the criminal act of reckless driving by Miss Kim which caused injury to citizens of Aharat.

Hence the entities can't claim safe harbour exemption, failing the test of Section 79(3)(a).³⁹ ¶18

III. Whether Muskla Inc., Muskla Aharat can claim any immunity from prosecution under the Penal Code and Motor Vehicles Act?

It is most humbly submitted that neither Muskla Inc. nor Muskla Aharat can claim any immunity from prosecution either under the Penal Code or MV Act. ¶ 19

A company can only act through humans and a human being who commits an offence on account of or for the benefit of a company will make the company responsible for it. The importance of incorporation is that it makes the company liable to individuals.⁴⁰ ¶ 20

Muskla is to be impleaded applying the principle of Corporate Attribution

Cases have been filed against CEOs of Muskla Inc. and Muskla Aharat simultaneously under the Penal code of Aharat and MV Act and as per the principles laid down for corporate attribution⁴¹; in Elangovan's case and Rani Shobha case⁴², a complaint or criminal case is not maintainable in the eyes of the law against the accused member of the company in his individual capacity without adding the company as one of the accused. Relying on the principle stated, Muskla Inc. and Muskla Aharat both are to be impleaded in the present case. ¶ 21

³⁹ Information Technology Act, 2000, §79, No. 21, Acts of Parliament, 2000 (India)

⁴⁰ Glanville Williams, Text Book of Criminal Law 970 (2nd ed. 1961).

⁴¹ Meridian Global Funds Management Asia Ltd. v. Securities Commission [(1995) 2 AC 500]

⁴² Criminal Petition No.11819 of 2014, Andhra Pradesh High Court

Muskla Inc. and Muskla Aharat are criminally liable under the Penal Code of Aharat

The criminal liability of a company is **not a *res integra*** and principles have already been laid down regarding the same. In **Hudson River Railroad Co.**⁴³ criminal liability was attached to a company for the very first time. With time India too accepted the principle in cases like PNB case⁴⁴ and Ekka Tonga Mazdoor Union⁴⁵. In **Syndicate Transport Co. (P) Ltd.**⁴⁶ SC recognized the liability of the company even in offences requiring mens rea, leaving no doubt that a corporation can be prosecuted for any offence punishable under law, whether it is coming under the strict liability or absolute liability. 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 punishment.^{47, 48 49} This was done by interpreting the word ‘and’ in the expression ‘shall be punished with imprisonment for a period of years (or months) and fine’ in penal provisions as ‘or’ under IPC.⁵⁰ ¶ 22

In **Syndicate Transport Co.**⁵¹, offences involving mens rea too were added to corporate criminal liability on the principle of **alter ego**⁵². The office bearers of a company are **directing minds** of a company. The LCI has recommended that all criminal liability and punishment should be linked with the corporation and not merely with the name of the director or manager⁵³. **The Draft**

⁴³ New York Central and Hudson River Railroad Co. vs. United States 53 LED 613

⁴⁴ Punjab National Bank v. A.R. Gonsalyes, Bunder Inspector, Karachi Port Trust AIR 1952 Cal 759.

⁴⁵ Aligarh Municipal Board v. Ekka Tonga Mazdoor Union AIR 1970 SC 1767

⁴⁶ State of Maharashtra v. Syndicate Transport Co. (P) Ltd AIR 1964 Bom 195

⁴⁷ Standard Chartered Bank and others vs. Directorate of Enforcement and others (2010) 160 Comp Cas 147 (SC)

⁴⁸ Iridium India Telecom v. Motorola Inc, (2011) 1 SCC 74

⁴⁹ Dr. Viloo Patell Vs Income Tax Department, WRIT PETITION NO.47514 OF 2017(GM-RES) , High Court of Karnataka

⁵⁰ Standard Chartered Bank v. Directorate of Enforcement (2005) 4 SCC 530

⁵¹ ibid

⁵² Praoddaturi Shibha Rani Shobha ... vs S.H.O., Dharmavaram Town P.S

⁵³ Law Commission of India, 47th Report: Trial and Punishment of Socio-Economic Offences, para 8.1

Amendment Bill to the IPC ⁵⁴, also contains provisions relating to corporate criminal liability. In the U.K. passed **The Corporate Manslaughter and the Corporate Homicide Act, 2007** ⁵⁵ for prosecuting companies for their lack of duty/care resulting in the death of a person. Where a corporation, through the controlling mind of its agents, does an act fulfilling the prerequisites of the crime of manslaughter, it is properly indictable for the crime of manslaughter⁵⁶ In the present case the AI is controlled by employees of the company hence attributable to it. ¶ 23

Relying on the laid principles both Muskla Aharat and Muskla Inc. are the necessary parties in the present case as both CEOs are impleaded. Chapter IV of PC provides for certain immunities to specific persons for the acts which otherwise are offences under PC. Although the person involves juristic persons under PPC no provision under the chapter is applicable to any of the companies involved in disputed actions in the present. ¶ 24

Sec.2, PC makes every person liable for committing acts inside Aharat, which are contrary to this code. And Section 11 of PC defines a person including any company or association. ¶ 25

It is to be submitted that considering all the principles and relevant provisions of the code, Muskla Inc. and Muskla Aharat cannot claim any immunity from prosecution under the Penal Code. ¶ 26

Muskla Inc. and Muskla Aharat are liable under MV Act for abetting Miss Kim

It is submitted that although the present MVA doesn't expressly deal with automated vehicles but the manufacturer of defective vehicles can sufficiently be made liable for abetting the driver of the vehicle under § 188 of the MVA. AI works as the driver in control of the manufacturer to a good

⁵⁴ Bill No. XXV of 2021, THE INDIAN PENAL CODE (AMENDMENT) BILL, 2021

⁵⁵ Section 1(1), The Corporate Manslaughter and the Corporate Homicide Act, 2007

⁵⁶ Reg. v. P. & O. European Ferries (Dover) Ltd. (1990) 93 Cr.App.R. 72, 84

extent, and hence in case of an accident caused due to such defect, the manufacturer can't hide behind any immunity to evade the prosecution under MVA. ¶ 27

Muskla Inc. and Muskla Aharat abetted Miss. Kim in driving M at a speed which is dangerous to the public having regard to all the circumstances regarding the amount of traffic which might reasonably be expected to be at that place, the school being in the vicinity and hence Muskla Inc. and Muskla Aharat both are liable under §188 r/w 184 of MV Act. ¶ 28

Miss. Kim hacked the system and accessed auto-pilot mode and then tricked it, hence violating provisions of the MV Act and road safety standards. Both the **companies were well aware of the vulnerability** as the same has been exposed by Miss Kim on social media and also in previous instances with many cars in Aharat, still both the companies did nothing to fix the vulnerability and **breached their duty**. The defect which allowed Miss Kim to trick the system by putting gloves instead of her hands could have been discovered by the exercising common tests as it being a very obvious and visible defect. On the grounds stated above, both companies are liable under § **188 r/w 190(1) and sec. 190(2)** of MV act for abetting Miss. Kim in driving dangerously. ¶ 29

Miss. Kim tampered with the mechanism of her car by hacking the auto-pilot mode without any lawful authority and reasonable excuse instead of it being not accessible in Aharat. This defect in the product made Ms. Kim hack the system to access auto-pilot mode which resulted in the accident. Muskla Inc. and Muskla Aharat **abetted Ms. Kim** in doing so by providing the defective car in which auto-pilot mode is accessible and hence liable under §188 r/w 198, MVA. ¶ 30

Both companies can't get any immunity from prosecution under MV Act. **AI can't be made liable and the legal liability can be imputed on the manufacturer** because of a faulty robotic system⁵⁷.

⁵⁷ United States v. Athlone Indus Inc (746 F.2d 977 (3d Cir. 1984))

Hence in the present case the manufacturers of the defective system i.e; the companies are to be held liable for the abetment of the act which resulted in casualty. ¶ 31

The SC⁵⁸ held that no liability can be imposed on the owner/driver where there is an absence of negligence. Applying this judgement, the accident by an automated car is not the negligence of the driver but of the manufacturer hence it should be liable. In the present case, the driving was handed over to a reliable AI as promised by Muskla in other countries but it failed and, Miss Kim wasn't involved in any rash driving which was controlled by an AI system developed by Muskla. Applying the verdict of **Naoshir Cama** case, liability can very well be imposed on the manufacturers i.e; Muskla. Art. 8, para 5 of both **Vienna**⁵⁹ and **Geneva**⁶⁰ **convention on road safety** provides room for the interpretation of the 'driver' which can be used to include automated vehicles and hence making the AI and hence the controllers i.e; manufacturers responsible. ¶ 32

IV. If the above issue is answered positively, then can Dusk and Dhanraj also claim immunity, given that they are just officers of Muskla Inc. and Muskla Aharat respectively?

Hereby it is humbly submitted that Mr Dusk and Mr Dhanraj cannot claim any immunity from prosecution on the ground that they are the officers of Muskla Inc. and Muskla Aharat. ¶ 33

Liability of officers of a company: To make the officers of a company personally liable for their acts against the laws of the land is not a res-integra anymore. It is a well-established principle that officers who are responsible for the wrong committed by the company are to be made liable in their personal capacity. The veil created between the corporation and its

⁵⁸ Zakaria & Ors. v. Naoshir Cama & Ors AIR 1976 AP 171

⁵⁹ Vienna Convention on road traffic, 1968

⁶⁰ The Geneva Convention on road traffic, 1949

employees is to be removed to make the real culprit liable as the company in itself has no brain to commit offences. ¶ 34

Piercing the corporate veil is a well-established principle so to make the real culprits liable who are hiding under the cloak of a company to give their wrongdoings away. Gajendragadkar, C.J.⁶¹ said that the rise and application of the doctrine is due to “the complexity of economic factors,” and “to meet the requirement of different economic problems.” The distinct legal entity of the corporation is subjected to the limitation that, “the veil of the corporation can be lifted and its face examined in substance” In the present case both the CEOs are to be held liable being the executive directors of Muskla they are in charge of day-to-day business and management and hence they are personally responsible for any action of the company. ¶ 35

Muskla and its CEOs are jointly liable

The company and office bearers can be impleaded simultaneously. As the court ruled⁶² that the identification principle was developed solely to attribute the actions or knowledge of corporate agents to a company. The cases that developed the principle were concerned simply with whether the company was liable for some legal wrong. In none of those cases was the agent's liability in issue, and in none of them was there any suggestion that a finding of liability on the company's part necessarily excluded the agent's liability. ¶ 36

The CEOs were although acting under their authority but were acting with a mala-fide intent by selling such cars in Aharat in which auto-pilot mode can be accessed and it is a well-settled principle that merely because the director/head has been acting under the authority provided by the company itself, she can't escape her personal liability on that ground if her action was not

⁶¹ Tata Engineering & Locomotive Co vs State of Bihar and Others 1965 AIR 40

⁶²Welsh Development Agency v. Export Finance Co Ltd [1992] BCLC 148 [1992] BCC 270 [1992] JBL 541

bonafide.⁶³ The word **bonafide** has been interpreted as a director who perpetrates a tort in the course of discharging his responsibilities doubtlessly commits a legal wrong and cannot, therefore, be regarded as having acted bona fide in the company's interests. Such a director cannot escape liability by hiding behind the company⁶⁴ ¶ 37

The person who was in charge of and was responsible to the company for the conduct of its business is held liable, unless he can prove that **the offence was committed- a. without his knowledge, b. despite his exercising due diligence to prevent the offence.**

Secondly, if it is proved that an offence under such statutes has been committed **-with the consent or connivance of”, or is “attributable to” neglect on the part of a director, manager, secretary or “other officer” of the company, such individual shall also be held liable.** ¶ 38

In the present case, both the CEOs had knowledge of the vulnerability present in the cars manufactured by their company and there is no such provision of attribution to exclude them both in either of the statute under which both are getting impleaded i.e; PC and MV act. Hence applying the principle stated above it is sufficiently clear that both the individuals can't claim any immunity being officers of the company for its conduct and are to be impleaded. ¶ 39

As both the CEOs are responsible for non-compliance of the conditions laid down for selling cars in Aharat by selling defective cars which resulted in a criminal offence due to their negligence in compliance, both are to be made liable in their personal capacity. ¶ 40

⁶³ ADGA Systems International Ltd v. Valcom Ltd, 1999 CanLII 1527 (ON CA)

⁶⁴ Ridgeway Maritime Inc v. Beulah Wings Ltd, [1991] 2 Lloyd's Rep. 611

It⁶⁵ was held that the corporate veil can be lifted if the company is being used to transgress any welfare legislation. In the present case, the company is being used to transgress legislations like PC, MV Act because these acts don't provide for automated cars expressly. ¶ 41

In furtherance, both the CEOs being the directing mind of the company are to be held liable under the **CPA under product liability**. Under **sec.2(34) of the CPA**, the definition of product liability is given as “the responsibility of a product manufacturer or product seller, of any product or service, to compensate for any harm caused to a consumer by such defective product manufactured or sold or by a deficiency in services relating thereto”. The ingredients required to sustain a case for liability of a manufacturer of AIs being the actual controllers are sufficiently present and hence it is suitable to pierce the corporate veil. The **concept of Joint liability** in corporate liability and has been in vogue since **Gilford Motor**⁶⁶, & was used in **Lipman**⁶⁷, where the court regarded the company as “the creature of the defendant, a device, a sham”. The court made the company a 2nd defendant. Hence even if the corporate veil is lifted to make the real culprits own the liability, the **company will still be made liable u/joint liability**. This concept has been used even as recently as 2001⁶⁸. **The LCI** expressed its views on the matter that it is usual to insert provisions to the effect that the Director /Manager who has acted for the corporation **should be punished**. But it is appropriate that the corporation itself should be punished. In the public mind, the offence should be linked with the name of the corporation, and not merely with the name of its officers.⁶⁹Hence relying on the principles laid down by the Hon'ble Courts, **it is humbly submitted that both the officers in addition to both the companies are to be held liable**. ¶ 42

⁶⁵Workmen of Associated Rubber Industry Ltd. v. Associated Rubber Industry Ltd. 1986) 59 Comp.Cas. 134 (SC)

⁶⁶ Gilford Motor Co. v. Horne (1933) Ch. 935

⁶⁷ Jones v. Lipman (1962) 1 WLR.

⁶⁸ Trustor AB v. Smallbone (2001) 2 BCLC 436

⁶⁹ Law Commission of India, 47th Report: Trial and Punishment of Socio-Economic Offences, para 8.1

PRAYER

Wherefore in light of the facts stated, issues raised, arguments advanced and authorities cited, the Defendant-Respondent most humbly and respectfully requests the Hon'ble Supreme Court of Aharat to adjudge and declare that:

1. The Government of Aharat's ban order prohibiting M's firmware and M's app to access its server maintained by Muskla Inc within Aharat is valid under Sec. 69A of the IT Act.
2. Muskla Inc. and Muskla Aharat cannot be termed as intermediaries under the Sec. 79 of the IT Act and will not receive any immunity u/sec. 79.
3. Muskla Inc., Muskla Aharat cannot claim any immunity from prosecution under the Aharat Penal Code and Motor Vehicles Act.
4. Mr. Dusk and Mr. Dhanraj cannot claim immunity from prosecution.
5. Muskla Inc. and Muskla Aharat are liable to pay damages u/sec 43A of the IT Act.

AND/OR

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

All of which is most humbly and respectfully submitted.

Sd/ _____

Counsel for Defendant-Respondent