CHAPTER-7

A Comparison of the role of directors under U.K. and Indian law

Definition of a director according to U.K. Law.

There is no true definition of the term “director,” although statute provides that a director includes any person occupying the position of the director, by whatever name called. A director is an officer of the company (but not necessarily an employee) and may be executive or non-executive, full or part-time. If the shareholders are the people who control the company, the directors are the people who manage it. They direct such of the company’s affairs as do not require approval from the members at a general meeting. When someone becomes a member of a company he accepts that in terms of the CA.1

(i) The director carry out most of the management of the company on behalf of the members:
(ii) The directors use the members’ investment in the company for the benefit of the company as a whole.

The above is subjected to certain powers retained under statute of the company’s article permitting members certain rights. Such as the rights to dismiss the directors or the rights to alter the article. In turn, directors have accept that their position are dependent on their ability to make a good return on investors capital or otherwise preserve the members’ willingness to let the company be managed by the directors.
Company law postulates a balance between the desire of the investor to be reassured that the directors are using his capital wisely and running the company properly. And the desire of the director to retain his position and any financial benefits that may accrue to it. The temptation of the investors is to refuse to let the director get on with his job without interference: the temptation of the director is to put his own private interests above those of his company’s investors and anyone else who may be affected by his policies, such as employees, creditors or investors.2

In many small companies, this conflict does not arise, as the directors are the shareholders. The larger the company, the greater becomes the separation between ownership and control. The opportunities for the directors to take advantage of their position increase, though equally in a well-run company accountability of the directors increases too. The law applicable to directors assumes that directors will take advantage of the members if they get the chance. While this assumption is unfair on the many Honorable and assiduous directors that clearly do exist. It is founded on many years of court case where directors have attempted to abuse their position at the company’s expense. Accordingly there are now complex statutory rules to ensure “fair play”, a large body of common law on the duties directors owe to their companies and specific rules about the eligibility, appointment, dismissal, disqualification and personal liability of directors. We shall shortly be looking at these rules.
In addition to the general task of managing the company as a member of the board of directors, a director has various statutory and common-law functions. Amongst other matters it is his job to:

Prepare and sign the accounts and directors report, which are sent to the register of companies.

Act bona fide in the best interest of the company as a whole:

Sign and take responsibility for any statutory declaration that may be required on such occasion as a company redeeming its own share out of capital or asserting the solvency of a company on a members' voluntary winding up.

Sign various forms required by the register of companies such as annual returns.

Convene general meetings when they are requisitioned by the members or in a case where there is a serious loss of capital.

Formulate proposals for approval of creditors in a company voluntary arrangement.

Lay a statement of affairs of the company before the creditors in a editors voluntary winding – up.

Recommend a dividend out of the distributable profits.
From where does a directors obtain his authority?

Directors obtain their authority to manage the company form the Articles. Table a art 70 states:

subject to the provisions of the Act [CA 1985], the memorandum and the articles and to any directions give by special resolution. The business of the company shall be managed by the directors who may exercise all the powers of the company, no alteration of the memorandum or articles and no such direction shall invalidate and prior act of the directors, which would have been given. The powers given by this regulation shall not be limited by any special power given to the directors by the articles and a meeting of the directors at which a quorum is present may exercises all powers exercisable by the directors.  

While not all companies will adopt the wording of table A art 70, many will have similar wording which give the directors the authority to carry out their task of “exercising all the powers of the company”. These powers are the powers that are specified in the memorandum as enabling the fulfillment of the objects clause. Historically, directors were not supposed to exceed those powers. However nowadays many companies have almost unlimited powers and open-ended objects clauses and so there is less likelihood of the directors exceeding those powers. Any decision taken by the directors within those powers will be valid.

However sometimes the memorandum, the articles or special resolutions will state limits on the directors’ own powers. Directors may be prohibited form making the company borrow more than a specified sum without obtaining the approval of the members first. This is deliberately to
Impose prudence upon the directors and to make them justify to the members their proposed action.

In small companies where all the shareholders are also the directors, there may be no need for such clauses. If the memorandum or articles imposed too many restrictions upon the directors, it may be difficult to find directors willing to put up with such restrictions. It may also be inconvenient having to call general meetings regularly to approve which are beyond the directors' authority. Furthermore, the directors, and indeed the shareholders, may start ignoring the memorandum or articles. This may not always matter very much if the members sanction the absence of prior approval, may also be applicable. If a company, through its directors, act beyond its powers (ultra vires), any member can bring proceedings to prevent the company repeating the unauthorized act, but those procedures will be void where some other person has already been granted contractual rights in respect of the unauthorized act. In any event the members can be special resolution sanction the unauthorized act, thus legitimizing it.

Who can be a director?

There are no specific qualifications needed to become a director unless the articles say so. Anyone who is not prohibited from being a director may become a director. A company, limited or unlimited, can be a director, and also can a Scottish partnership, a director which is a company function through its own directors, and a directors that is a Scottish partnership can sanction through any of the partners.
Sometimes persons in a business are given titles such as "sales director" or "marketing director" this does not mean that they are directors of the company in law. You are only a directors if you have been appointed by one of the formal under noted methods, are a directors by virtue of holding the position of a director under the CA 1985 s 741(1) or are a shadow director by virtue of the CA 1985 s 741(2).

The following are prohibited from being directors:

- An undercharged bankrupt without leave of the court under s 11 of the company directors disqualification Act 1986
- Person disqualification under other sections within the CDDA, such as having a conviction for running a company for a fraudulent purpose;
- Directors over the age of 70 in a public limited company or one of its sub its subsidiaries unless retained in office by the articles or unless the members have approved their directorship by means of ordinary resolution following special notice
- Directors who have failed within the requisite time (normally two months) to obtain the minimum numbers of shares required for them to be directors in terms of their companies' articles. These shares are known as qualification shares:
- Auditors of the company:
- The secretary of a private company when there are no other directors.

Bankrupt

The principle behind the prohibition of bankrupts is very clear; no one would wish a person who is unable to look after his own finances to look after a company's. Unfortunately the reality is less simple. A
look after a company's. Unfortunately the reality is less simple. A bankrupt is not supposed to be a company director, but a bankrupt director could if devious enough invent a new name and address and be appointed to the directorship of a company. Even through directors are supposed to give their national insurance number to the Inland Revenue on the incorporation of a company. The bankrupt could claim to be foreign and not have a national insurance number: there are no nationality restriction upon company directors.

A second problem in practice is identical names. In a household with two john smiths it is hard to know which one might be the bankrupt. It is for that reason that the age of the director has to be given. The registers of bankrupts and those disqualified under the CDDA are crosschecked with the register of companies to ensure directors.

Directors over the age of 70

The principle behind the age requirement, which only applies to ples and their subsidiaries, is to prevent elderly directions hampering the progress of the company. Occasionally people who ran their own companies find it difficult after many years to hand over the reins to others. They may also be unwilling to accept that they may not be as good businessmen as they once were. Once the director reaches the age of 70 the members of the public company will at least have the opportunity to vote him out of office – unless the managing director owns most of the shares or has tailored the article to hi own benefit beforehand
Qualification shares

Qualification shares exits because it is thought that directors who have a personal stake in a company are more likely to try hard for the overall good of the company.

According to Indian law:

Directors means "the invisible and intangible nature of a company make it obligatory for this corporate body to appoint some living person through whom it may act and carry on its business such person are usually called directors of the company" the above definition brings out the essences of what a director is and his special and superior role as such. Director as an officer has a special privilege in as much as he is a member of the governing body and has a hand in the determination of the general policy of the commercial company. His position is unique. An idea of the importance attached to the position and responsibility of the directors in relations to the companies. There is no much difference about the definition of UK Law and the Indian law because from the time immoral we have been following the English law in our country the companies Act 1985 was consolidating statute that gathered together and rationalized a number of other company law measures. It took account of certain European directives and at the time of writing is the main company law statute.

Appointment of directors under English law and Indian law

Appointment of directors under English law

Although there is no maxima for appointments of director's a public company must have at least two directors, and a private company may have a sole director only if a sole director is not the secretary of the company.
The first director are appointed by the subscribers to the memorandum. The appointment of subsequent directors is primarily determined by the article, which usually confer the power of appointment both on the directors and on the company in general meeting. Table a provides that a third of all directors shall retire by rotation at successive AGMs, at which they are then eligible for reappointment by the share holders it is usually specified however that a managing directors or the directors holding executive office shall not be subject to retirement by rotation.

Directors may resign form office at any time, and directors of public companies must retire at the age of 70 unless the continuances of their appointment is approved by a resolution in general meeting. It is also usual to provide in the article that directors shall be required to vacate their office on the occurrence of certain events, such as becoming a mental patient or being absent without leave for more than a certain period of time, or if they have been disqualified under the Company Directors Disqualification Act 1986.

Notwithstanding anything to the contrary in the articles or in a separate contract between the company and a director, the company may remove a director by ordinary resolution (requiring over 50 per cent of votes in favour) provided that special notice of 28 days has been given of such removal and certain others statutory procedures are followed. The board of directors also commonly has the power to remove one of their number from office, either by simple majority or by qualified majority set out in the articles.
The first directors are those who sign the form 10 which is sent to the registrar of companies on incorporation. Even if someone else is named in the articles on incorporation as the first directors, the first directors or directors will be those named in the form 10 (CA 1985 s 10(5)). Private limited companies need only have one directors (CA 1985 s 282(3)), but it is common to have. Table a required a minimum of two (Art 64). Public companies must have at least two (CA 1985 s 282 (1)). A directors can simultaneously be company secretary and director, but if so, there must be one other directors since the one person cannot act in a dual capacity whenever an act, such as signing certain forms, has to be performed by both a directors and the secretary.

Subsequent directors
The method of appointing further directors is normally stated in the articles. Common methods include:

- Appointment by the members at a general meetings;
- Appointment by the other directors to fill vacancy until the retiring directors offers himself for re-election and the meeting has not rejected his offer or resolved not to fill the vacancy (art 75);
- Co-option by the existing directors.

A new director in a table a company offering himself for election must:

(i) Have been recommended by the directors;

(ii) Have arranged that the members should have been given between 14 and 35 days notice prior to the meeting when the election will takes place of the intention to elect the new director (Art 76);

(iii) Inform the company of all the details that would need to be entered into the company's own register of directors interests;

(iv) Consent to being a director.
The rules on rotation and appointment of directors are very complicated. This is because in small companies directors have no desire to keep resigning and being reappointed, and make them self eligible for re-election. Many small companies nowadays have much simpler articles that dispense entirely with the rotation of directors rules. Despite this rotation of directors as a principle is not without merit because:

(i) Every few years there is an opportunity to fail to re-elect directors who might otherwise be there for ever;

(ii) It provides a mechanism for dismissing directors without having to go through the cumbersome and sometimes embarrassing s 3003 procedure;

(iii) The knowledge that every three years (or such shorter period as may be demand by the articles) the directors have to justify their continued directorship to the members can motivate the directors to work harder for the company.

However determined directors. Particularly if they are founded directors, ensure that their companies' articles states that they are to be directors for life, or give themselves weighted voting rights

If a public company wishes to appoint several new directors at a general meeting. Each dire must be separately voted on the board (CA1985 s 292 (1)). However if at the meetings there is a preliminary motion asking that two or more directors be appointed all the one resolution and the motion is passed without anyone voting against it is permissible to vote two or more directors into office without the need for separate resolutions (CA 1985 s 292(1)).
The purpose of this piece of legislation is to prevent an unwelcome director being part of a package with some desirable directors, so that to obtain the desirable directors one has to accept the unwelcome one. This is not permissible (CA 1985 s 292(1)), but because there might be occasion when a public company is appointed many new directors, and it would be tedious to vote on each one separately, the permissive procedure is available (CA 1985 s 292(1)).

When a new director is being appointed to fill a vacancy other than a casual (i.e. temporary and until the next AGM) vacancy, arising out of the dismissal of a director under the outgoing director and to appoint the new one (CA 1985 s 303(2)).

What happens if the appointment is defective?

Under table A art 92 and the CA 1985 s 285 if a director carries out certain acts, either on his own or as part of a board of directors and it subsequently turns out that at the time he was not formally holding the post of director because of a defective appointment. His acts are still valid. This is because a director might genuinely have believed he was a director; everyone might equally have been of the same belief; and it would be unfair on third parties who had relied on the company's word and his word that he was a director to be told that his acts were invalid and that the third parties' contracts with the company were invalid. Providing all parties have acted in good faith there should be no difficulties with this. In the case of Morris v Kanssen (1946) AC 459 a director deliberately used these rules to assert the validity of a bogus appointment but failed. This was because the wording of art 92 and s 285 are designated to protected the inadvertent failure to appoint, not to permit the ignoring or overriding of the substantive
Provision relating to such appointment directors over the age of 70 in public companies are meant to vacate office at the end of the AGM following their 70th birthday. If by some oversight they fail to vacate office and continue to act, their acts are still valid even if it is afterwards discovered that their appointments as directors have terminated. This is again to protect those who had the director's word or the company's word that the CA 1985 ss 35, 35 A and 35 B serve to protect the third party dealing with the company through the defectively appointed director. It is however likely that if the third party knew and director was defectively appointed and was taking advantage of that information, the third party would not be able to enforce the contracts against the company.

Disclosure requirements for directors

On appointment a new director signs a form 10 (for the first directors) or a Form 288a. This indicates his consent to the directorship. The forms must be sent to the registrar of companies. On these forms he must also indicate his:

- Present name:
- Any past names:
- Usual residential address, or for a company, its registered office and for a skittish partnership, its place of business;
- Nationality (expect for companies and partnerships)
- Business occupation (many directors just write "Company director");
- Particulars of any other directorship held by him or which have been held by him within the last five years, with the exception of dormant companies or other companies within the group of companies of which the present company forms a members.
- The date of his birth. This is because directors of public companies and their subsidiaries need approval from the members if they are to remain in office over the age of 70.

The reason for the disclosure of the present and past directorship is to allow investors and creditors the opportunity to see what other companies and directors have been involved in investors and creditors can then obtain those other companies accounts form companies house they can then ascertain how successful he has been in running them and decided whether or not the director has been entirely truthful in his statement of past and present directorships.

In addition, the director is under an obligation to disclose to the company his interest in any securities and options in any subsidiary or holding company of that company. He is obliged to notify the company within five days of any changes to his holdings of these securities. These rules apply to:

(i) The director’s spouse and children.
(ii) Companies in which he has more than one third of the voting control or in which the board of directors act as he wishes.
(iii) Any trust in which he has an interest as beneficiary.

The company must keep a register where all these interests are noted (A 1985 s 325). This information is kept at the company’s registered office but is not forwarded to the register of companies. However, in the case of companies whose securities are listed on recognized investment exchange, this information must be conveyed to that exchange the day
after the company receives the information from director (CA 1985 s 329(2)). In practice in the UK this is the Stock Exchange. This means that it is possible for ordinary investors to see whether directors are selling their shares or buying them. If the directors are buying the shares, they presumably know something advantageous about the company’s prospects that others do not; if they are selling one may be tempted to assume that bad news lies ahead.

Appointment of Director under Indian law

Appointment of Directors by the Board

While the general power to appoint directors vested in the general meeting of shareholders, they are at least two cases when the board can also appoint new directors. Occasionally there may be conflict between the general meetings and the directors, A clause in the articles of a company authorized the directors to fill casual vacancies and also to increase the numbers of directors with in maximum number fixed in the articles some casual vacancies occurred but they were promptly filled at a general meeting of the share holders. This was challenged on the ground that once the power to appoint was delegated to the board it could not have been exercised at a general meeting.

After extensive review of the English case the court upheld the appointment and said “the principle can be summed up thus a company has internet power to take all the steps to ensure its proper working and that of course, includes the power to appoint the directors. It can delegate this power to the board which could function or there is a board that is unable or unwilling to function the authority delegate to the board lapses and the members can exercise the right inherent in them of appointment the directors.
Appointment of Directors by the Central Government

The directors appointed by the Central Government under Sec. 408 need not be the members of the company. The government directors may be required to keep the government informed about the affairs of the company. They shall not be required to hold qualification shares and are not liable to retire by rotation. But they can be removed by the Central Government at any time or substitute by other person appointed in there place. The powers conferred on the Central Government is extra-ordinary power which should be invoked only in genuine case whether the central government is satisfied that the affairs of the company being grossly mis-managed or its minority shareholders are being unduly oppressed and the reminder action is needed. The company should be given opportunity of being heard before directions are appointed by the Central Government.

Appointment of Directors by Third Parties

The article may confer right on the debenture-holders, financial institutes or banking companies who have advanced substantial loan to the company, to nominate directors on the board of the company.

The number of directors so nominated shall not be liable to retire by rotation. Such nominee directors are generally appointed to protect the interests of the controlling agencies. Though the companies Act has not specified defined the term "nominee Director".

But it is common practice that the companies usually provide for the appointment of nominee directors in their Articles of Association.

The success of the company depends to a very large extent upon the competence and integrity of its directors. It is therefore necessary that
management of companies should be in proper hands. The appointment of directors is accordingly strictly regulated by the act. There are now special provision for preventing management by undesirable persons.

Under English law the appointment of director is strictly followed by rules and regulations because the whole management of company is in the hands of directors.

According to the English law now director will not be appointed unless his past performance must disclose the reason for the disclosure of the presence and past directorship is to allow investors and creditors the opportunity to see the performance in other companies.

In Indian law this particular rule will not be strictly followed but one evil which has been abolished by the Act is that of a company or firm acting as director of another company now according to section 253 only an individual can be the director of a company no company or firm or association can be appointed as a director.

Duties of Directors under English law and Indian law

Duties of director under English law

The management of a company is usually delegated to its directors by the Article, and the directors may exercise all the powers of the company through resolutions passed at duly convened board meetings. In practice, the day-to-day decision-making is delegated to executive or managing directors or to committees of directors under empowering provisions in the Articles.
The relationship between a company and its directors is partly that of principle and agent. The directors are also trustees of the company's assets. The general role of the directors is to manage the business of the company for the benefit of the shareholders. For this reason the directors have the powers to bind the company.

When exercising his powers, a director must act not only in good faith and with honesty but also in the best interest of the company. He must not use company property or information gained in the course of his duties for his own personal gain. A director acting honestly and with reasonable care will usually be held to have performed his duty if he believed on reasonable grounds that the transaction he approved was for the benefit of the company. However even this will not be sufficient if for example:

(i) The transaction is outside the scope of the company's objects or and abuse of the powers given to the directors;
(ii) A personal profit was made by the director, even if the company also benefited; or
(iii) The director did not declare his interest in the transaction.

Certain conflicts of interest and duty may arise because of restriction in company law.

The directors' duties are prescribed by both command law and statute. In command law, a director must exercise reasonable skill and care in carrying out his duties must consider the position and interests of editors if the company is insolvent and must have regard to the interest the company's employees in general as well as the interest of the company. Director also owes a duty to the company's shareholders collectively rather than individually. Shareholders have important statutory
rights to apply to the court on the ground that the company's affairs are being or have been conducted in a manner, which is unfairly prejudicial to the interests of some or all of the shareholders.

In addition to these command law duties, the directors are responsible for the performance of the duties imposed by statute and non-compliance with any of these may give rise to a fine or to disqualification or even imprisonment if the default is serious or persistent. Their statutory duties are to maintain proper accounting and value added tax records, to ensure that the annual accounts are prepared in accordance with companies Act requirements, and to maintain the various statutory books which must be kept at the company's registered office i.e. the register of members, the register of directors and secretaries, the register of directors' interests, all of which must be open to public inspection.

The directors are also responsible for ensuring that the company complies with relevant legislation such as that relating to employees, health and safety at work and environmental protection.

Board Meetings

Directors must ensure that the board meets sufficiently frequently to enable it to discharge its duties properly adequate notice should be given to allow the attendance of all directors and relevant papers should be circulated in advance of all minutes must be kept of all board meetings recording the names of the directors present, the directors reached and the views expressed. The Articles usually prescribe such matters as period of notice, quorum, voting, chairman's casting vote etc.
Directors' duty under India Law

Apart from the general obligations of directors to act in accordance with the companies act in particular and other law in general the duties of directors may be summarized as follows:

1. Fiduciary duties and obligation of Director's
2. Director's duty of care.
3. Director's duties to individual members.
4. Duty to disclose personal interest
5. Director's duty to attend Board's Meetings
6. Director's duty towards other person (i.e. third parties)

1. Fiduciary Duties

Directors stand in a fiduciary relation with the company of which they are directors, that is, they are bound to exercise their rights and powers in good faith for the benefit of the company. It is a well recognized principle that directors because of the fiduciary relationship cannot use their position so as to benefit themselves unless they do so with the knowledge and assent of the company. Thus in one case, a new issue of shares was offered to shareholders at a premium. The directors arranged with one A to take, at a large premium, the shares not taken up by the existing shareholders. A, being unable to fulfill his contract, requested the directors to relieve him of the same. The directors did so and made a profit. It was held that the directors were accountable for the profit so made.
2. Director’s duty of care:

   The directors of a company are expected to perform their function with reasonable care and attention. They must discharge their duties and obligations with skill and diligences as expected from reasonable persons of his knowledge and experience.

3. Director’s duties to individual members.

   It must be started that directors owe a duty to their company but not to individual members while carrying out transaction with such members, whether the directors act on behalf of the company or on behalf of themselves.

4. Duty to disclose personal interest

   The relationship between director and the company being that of an agent and a principle the former occupies a fiduciary position towards the latter, therefore directors are under a duty to ensure that their personal interest do not clash with those of the company’s interest.

5. Director’s duty to attend Board’s Meetings

   Though directors are not bound to attend all the meetings of the board; generally, a director shall stand vacated if he absents himself from three consecutive meetings of the board or from all meetings of the board for a consecutive period of three months, is held not liable for transaction based on the decision taken in the board meeting in which he was absent.

6. Director’s duty towards other person (i.e. third parties)
It is true that the directors are not personally liable for the contracts entered onto by third parties with the company instead the company is held liable for such transactions.

**Duty to Employees**

Under common law, directors have no duty of care towards employees, but statute now supplies a carefully worded duty in the CA 1985 s 309:

(1) The matters to which the directors of a company are to have regard in the performance of their functions include the interests of the company's employees in general as well as the interests of the members.

(2) Accordingly, the duty imposed by this section on the directors is owed by them to the company (and to the company alone) and is enforceable in the same way as any other fiduciary duty owed to a company by its directors.

This provision was inserted to satisfy criticism that a company should be seen to give some attention to those who labor to produce the dividends that the members receive. There are inevitably various difficulties with the wording:

- The wording does not specifically confer a right upon employees to raise an action against directors in the way that, say the CA 1985 s 459 specifically confers a right to minority shareholders to petition the court in the event of suffering unfairly prejudicial conduct from majority shareholders. Under s 309, the directors merely have to "have regard", a term which suggests a passing mild concern rather
than a positive duty to consider what might genuinely be in the best interests of the employees:

- Subsection(2) makes it clear that only the company can raise an action if the directors are not having enough regard for the interests of their employees. So if the members are not minded to make the company raise an action, the employees will obtain no remedy under this section. However, this will be less true in the case of companies where the employees have a substantial stake in the company – their interest will be then less lightly ignored.

- Although it might be politically unwise to put it so boldly, it is obvious that a greater concern for the employees may in the short term diminish profits for the members, especially if the concern is realized in the form of higher wages. Except where mistreatment of the employees erupts into strike action which affects the profits of the company, many members are unlikely to trouble themselves about the employees. They are then less likely to put pressure upon the directors to concern themselves about the interests of the employees:

Increased employee benefits may be a cost that lowers the profits and consequently the share price of a company. If a director's remuneration is linked to the attainment of certain high share price targets, or he has share options which are triggered by a rise in the share price, the director may have less incentive to attend to the interests of the employees.

433
If can therefore be said that though UK law does ostensibly take cognizance of employee interests, the reality is that the relevant section is of little practical use.

A recent attempt by an employee to assert a duty of care against a director failed.

Richardson v Pitt-Stanley [1995] 1 All ER 460. An employee was injured at work. At or around the same time, the company went into liquidation. On investigation, it was discovered that the directors whose job it was to insure their employees against work injuries had failed to obtain any such insurance. The company secretary had also failed in this respect. The employee tried to sue the directors and company secretary for negligently failing to insure against employee injury. It was held that notwithstanding the directors' and company secretary's undoubted failure to obtain insurance, which could be the subject of criminal proceedings, any claim the employee had for negligence could only be against the company and not the directors or company secretary personally. As the company was in liquidation, the employee was unable to obtain any compensation from the company.

Liability of Directors under English Law and Indian Law

Legal Liability of Directors under English Law

The personal liabilities which can be imposed on directors for both civil and criminal offences are potentially very great and may arise in the following circumstances.
A. Abuse of Powers. Directors must not act outside the objects of the company as set out in its Memorandum and must use the powers given to them only for their proper purpose, or else they may incur personal liability unless relieved by special resolution of the shareholders. The directors were required to ensure the work that the work they doing for the company does not conflict with the objectives of the company in INTRODUCTIONS LTD. v. NATIONAL PROVINCIAL BANK LTD., 10

The facts are as follows:

The plaintiff-company was incorporated in March, 1951, for the purpose of offering services and information to visitors from overseas in connection with the Festival of Britain and thereafter to visiting businessmen generally. The Company's memorandum of association contained an assembly of diverse objects and powers and ended with a clause declaring that each preceding sub-clause should be construed independently of and should be in no way linked by reference to any other sub-clause, and that the objects set out in each sub-clause were independent objects of the Company. Sub-clause (N) enabled the Company to borrow or raise money in such manner as it thought fit. From 1951 to 1953 the Company provided accommodation and services for visitors from abroad. From 1953 to 1958 its only business was the provision of deckchairs and amusement machines at a south coast resort. In November, 1958, 398 of the four hundred issued shares changed hands and there was a complete change in the board of directors. In November, 1960 the company began pig-breeding as its only business. In December, 1960, the Company borrowed money on the security of debentures from its bankers, the defendant bank, the Bank being fully aware that the only business carried on by the Company was pig-breeding and that the objects for which the Company

435
was formed were those set out in its memorandum of association of which the bank had a copy. At a time when the Company was substantially indebted to the Bank it was put into compulsory liquidation. On the question whether the borrowing from the Bank was intra vires the Company.

HELD. (1) On the true construction of the memorandum and articles of association of the company the carrying on of the business of pig-breeding, as the sole business of the company, was ultra vires the company.

(ii) On the true construction of sub-clause (N) of the memorandum of association (which was a sub-clause that was incapable of being a wholly independent object, notwithstanding the final provision in the memorandum declaring all the objects to be independent) the power of borrowing that sub-clause (N) conferred was the power to borrow for the legitimate purposes of the company, and, as the borrowing from the bank was for a purpose that was ultra virus, viz., carrying on the Business of pig-breeding, the borrowing (and thus the creation of the debentures) was ultra virus.

JUSTICE PARKER declared the judgment and laid down the following law.

Where a company incorporated under the Companies Act, 1848, has the power to borrow, that fact must be discovered from its memorandum of association. The power may be one which has to be inferred from the objects of the company, or it may be one that is expressly conferred from the objects of the company, or it may be one that is expressly conferred on the company by the terms of its memorandum. If the power to borrow is one which is inferred, it naturally follows that the borrowing is only within
the power of the company in relation to those matters in respect of which
the inference arises. Where the memorandum is one in which those sub-
clauses of the objects clause, which confer what are truly powers rather
than objects, are to be read as subsidiary to the main and real objects of
the company, in such a case also the borrowing power must be read as
confined to borrowing for the purposes for which the company is formed.
Moreover, borrowing for any purpose other than the legitimate activities of
the company will be ultra vires, and if the lender is aware of the
circumstances which render the borrowing ultra vires he will be unable to
recover the moneys as moneys lent.

B. Breach of Duties. If a director is in breach of any of the duties imposed
on him, he may be personally liable to pay to the company any profit he
has made and/or reimburse the company for any loss suffered as a result
of such breach. Relief is however available to any director who, although in
breach of a non-statutory duty, has acted honestly and reasonably. We
have seen how the post of a Director is very responsible and requires a
great
deal of confidence. Is liable to account the company everything including
any profit derived personally from Contract involving the company of which
is a Director. A beautiful example a case decided by the privy council that
COOK v. DEEKS AND OTHERS.11 Directors of a construction company
negotiated with a railway company a contract on their own behalf, but in
exactly the same manner as that in which they had previously acted when
negotiating contracts for the construction company, and with the
advantage of the successful completion by the construction company of
contracts for the railway company in the past. When all the necessary
preliminaries of the contract had been concluded the directors formed a new company to carry it out, and at a meeting of the construction company, owing to their voting power, they secured the passing of a resolution authorizing them as directors to defend an action brought by the plaintiff, a minority shareholder, against them and the new company for a declaration that they and the new company were trustees of the benefit of the contract for the construction company.

The Court of Appeal held that the directors were guilty of breach of duty in the course they took to secure the contract; they could not retain the benefit of that contract for themselves, but must be regarded as holding it on behalf of the construction company; the resolution the passing of which they had secured was ineffective to regularize the position; and, therefore, the plaintiff was entitled to the declaration which he claimed.

Further explaining the guilt of a directors LORD BUCKMASTER, L.C. – Explain the nature of their liability by saying that the directors if had examine a desecration or deemed on a matter of policy the different result would ensure. Hence the defendant found accountable to the Toronto company for the profit which they had made out of the transaction by this the Hon'ble Judge defined the extent of liability for profit gain when a person in a fiduciary position as a trustee.

C. Liabilities to Shareholders. Directors may also be personally liable to the shareholders. Under criminal legislation, the directors are guilty as officers of the company of a criminal offence if they publish an account of the company's affairs with intent to deceive the shareholders or creditors and knowing that it is or may be false, misleading or deceptive. In addition,
directors may be personally liable if a person suffers loss as a result of the directors knowingly permitting a contravention of any of the pre-emption rights on transfer of the existing shareholders.

D. Liabilities to Investors. Directors may incur liability for deceit or fraudulent misrepresentation, at common law in relation to dealings in the securities of a company, and under the Financial Services Act 1986 which requires prior authorizations to be obtained before any investment business (including offers and disposals of securities) may be lawfully conducted. Any information obtained by a directors of the company is a matter of confidence, in a case where the information obtained by the director of a company regarding the names and addresses of a companies selling agents, the directors can be removed from office.

In BAKER V GIBBONS AND OTHERS:12

A company carried on the business of marketing a specialized item of cavity wall insulation. For that purpose it employed 16 selling agents who each covered a specific area in the United Kingdom. The agents, who worked on a commission basis, had been trained by the company in that particular field of business. The plaintiff, after joining the company, became a director. He was later removed from office and thereafter set up a competing business. In proceedings instituted by the plaintiff against the company and two of its directors the company applied for an interlocutory injunction to restrain the plaintiff from soliciting agents of the company to terminate their employment. It was alleged that during his period of service as a director of the company the plaintiff had learnt the identity of the company's agents and had become known to them; that since his removal from office and by use of the knowledge of the company's affairs and business acquired while he was a director, the plaintiff had wrongfully

439
solicited four of the company's agents to terminate their employment and enter the plaintiff's employment. In an affidavit in support of the motion it was alleged, inter alia, that the plaintiff had used the confidential information as to the names and addresses of the agents and their terms of employment which he had acquired as a director, in order, for his own advantage and at the expense of the company, to provide himself with a ready made sales organization which, to his knowledge, had been laboriously built up during the preceding two years. It was contended by the company that, where a person, particularly the director of a company, had obtained confidential information he could not use it to the prejudice of the person who had given it and that the names and addresses of the agents were confidential information obtained from the company without which it would have been impossible for the plaintiff to solicit the company's agents.

It was held that — The Company had failed to make out a case for the injunction sought. There was no general rule that, in every instance where, during the tenure of his office, a director had learnt the name and address of a particular employee of his company, that information was ipso facto to be regarded as confidential. Furthermore even if the plaintiff had learnt the name and address of any one of the company's 16 agents, that information, used in isolation from the names and address of the others could not, ipso facto, be regarded as having been received in confidence. In the absence of evidence establishing severally, in the case of each individual member of the class, that the information obtained as to his name and address should be regarded as confidential, an injunction restraining the soliciting the members of that class would only be directed to be use of a written list.
The judgment was delivered by justice PENNYCUICK V.C, the court explain that the position of a Director was a highly confidential in nature. Whatever information the Director obtains regarding the agent and customers of the company is highly confidentially laying down the principal he said.

'I think that enough is established to warrant our granting an injunction against the defendant upon the principle that the court is satisfied that he had these notes and was making an improper use of them, and that he would do it again now if he were not stopped. I think, therefore, an injunction ought to go, although not quite in the form in which the plaintiff asks for it. What I think the plaintiff is entitled to is an injunction to restrain the defendant, his servants and agents, from making use of any copies or extracts from the plaintiff's register of agents, or index, or any memorandum made or obtained by the defendant when in the plaintiff's employ relating to any person named on those books or either of them. That, I think, is as far as we can go. If the defendant happens to remember that there is an agent whose address he can find out from the ordinary directories, he is at liberty to do it. But he has no right to do that which he has done, and which he certainly would do again if he had the chance.

E. Criminal Liability of Directors. A director who fails to obey certain statutory rules is liable to a fine or imprisonment. The rules that are enforced are generally speaking the ones involving failure to disclose information to the registrar of company's in time offences of directors towards creditors or investors inadequate maintenance and preservation of
company records and accounts false accounting and for evasion makes
then criminally work.13

Liabilities of Directors under Indian Law

The liabilities of directors may be considered under the following heads:

1. Liability to the company.
2. Liability to third parties.
3. Liabilities for breach of statutory duties.
4. Liability for acts of co-directors.
5. Criminal liability.

Liabilities to the company. The liability of a director to the company
may arise from:

a) Breach of fiduciary duty.
b) Ultra vires acts.
c) Negligence, and
d) Malafide Acts.

a) Breach of fiduciary duty – Where a director acts dishonestly to the
interest of the company, he will be held liable for breach of fiduciary
duty. Most of the powers of directors are powers in trust and
therefore, should be exercised in the interest of the company and
not in the interest of the directors or any section of members. Thus
where the directors, in order to forestall a take-over bid, transferred
the unissued shares of the company to trustees to be held for the
benefit of the employees, and an interest-free loan from the
company was advanced to the trustees to enable them to pay for the
shares, it was held to be a wrongful exercise of the fiduciary powers of the directors.

b) Ultra vires acts – Directors are supposed to act within the parameters of the provisions of the Companies Act, Memorandum and Articles of association, since these lay down the limits to the activities of the company and consequently to the powers of the Board of directors. Further, the powers of the directors may be limited in terms of specific restrictions contained in the Articles of association. The directors shall be held personally liable for acts beyond the aforesaid limits, being ultra vires the company or the directors. Thus, where the directors pay dividends or interest out of capital (except the pay under section 208 of the Act), they will be liable to indemnify the company for any loss or damage suffered due to such act.

c) Negligence – As long as the directors’ act within their powers with reasonable skill and care as expected of them as prudent businessmen, they discharge their duties to the company. But where they fail to exercise reasonable care, skill and diligence, they shall be deemed to have acted negligently in discharge of their duties and consequently shall be liable for any loss or damage resulting there from. However, error of judgment will not be deemed as negligence. It may be noted that the directors cannot be absolved of their liability for negligence by any provisions in the Articles (Section 201)

d) Mala fide acts – Directors are the trustees for the moneys and property of the company handled by them, as well as for exercise of the powers vested in them. If they dishonestly or in a mala fide
manner, exercise their powers and perform their duties they will be liable for breach of trust and may be required to make good the loss or damage suffered by the company by reason of such mala fide acts. They are also accountable to the company for any secret profits they might have made in course of performance of duties on behalf of the company.

Directors can also be held liable for their acts of 'misfeasance', i.e., misconduct or willful misuse of powers. However, misconduct which is not willful shall not amount to 'misfeasance'. Moreover, the directors are entitled to relief against liability for breach of trust of misfeasance. Director of a company are criminal liable for acts done in the name of the company.

**N.C.SIPPY AND OTHERS v PREM KUMAR.14**

**FACTS AS FOLLOWS:**

The complainant-respondent produced a cinematography film. It was completed in 1979 and was duly certified for unrestricted public exhibition by the appropriate authority under a certificate, valid up to 13 June 1989. The complainant averred that the first accused, the managing director of the second accused company, with the other accused, the other directors of that company, infringed the copyright in the film produced by him, and that they had also committed the offence of piracy by preparing unauthorized video tapes of the same. It was alleged that all of them were criminally liable for the offences of infringement of copyright and forgery. It was found as a fact that the petitioners were directors of the company and that they were actively participating in its affairs. The question before the court was whether the directors could be fastened with the vicarious
liability for the offences of the infringement of copyright and forgery, as alleged.

It was held that the fact that the petitioners were the directors of the company and that they were actively participating in the affairs of the company would ex facie warrant inference that they were in charge of and responsible to the company for its day-to-day business. It is their active participation in the affairs of the company as directors that constitutes the gravamen of the charge to hold them vicariously liable for the acts of omission and commission of the company.

There must be a clear and explicit averment regarding the active participation of the directors in the business of the company at the time of the commission of alleged offence.

It is well settled by a long catena of decisions of the Supreme Court that the jurisdiction of the High Court while exercising its inherent power under section 482 of the code to quash the first information report on a complaint is very limited. It has no jurisdiction to examine the correctness or otherwise of the allegations; and it would be justified in quashing the complaint of the proceedings only if no evidence is made out on the allegations made in the complaint or documents accompanying it per se. On the facts, no evidence of forgery having been found to have been made out against the petitioners, even prima facie but the case with regard to the infringement of the copyright having been made out ex facie, the case was remanded to the trial court for proceeding further against petitioners only in respect of the infringement of the copyright in accordance with law.

445
Where a company incorporated under the Companies Act, 1948, has the power to borrow, that fact must be discovered from its memorandum of association. The power may be one, which has to be inferred from the objects of the company, or it may be one that is expressly conferred on the company by the terms of its memorandum. If the power to borrow is one which is inferred, it naturally follows that the borrowing is only within the power of the company in relation to those matters in respect of which the inference arises. Where the memorandum is one in which those sub-clauses of the objects clause, which confer what are truly powers rather than objects, are to be read as subsidiary to the main and real objects of the company, in such a case also the borrowing power must be read as confined to borrowing for the purposes for which the company is formed. Moreover, borrowing for any purpose other than the legitimate activities of the company will be ultra virus, and if the lender is aware of the circumstances, which render the borrowing ultra virus he will be unable to recover the moneys as moneys lent.

Justice J.D. JAIN, of Delhi High Court distinguished in this case between active director and passive directors and Sec. 69 of the Act, which deals with the offence of company it is the only the active director who can be made punishable. In this case however it was found that N.C. SIPPY AND R.N. SIPPY father and son who were passive directors were did not liable but the law regarding permanent directors stands.

Criminal Liabilities: A part from civil liability under the Act or under the common law, directors of company may also incur criminal liability under common law as well as under companies Act.
Under English Law and Indian law we can see that there is lot of similarity on applicable of civil liability and criminal liability against director for the offence committed by their in the name of the company.

VICARIOUS LIABILITY

We would like to differentiate the law laid down by the English and Indian Company law, on the “Directors vicarious liability for offences by companies”

Under English Company law courts equate the mind of these human persons with that of the legal persons, i.e. the company, so as to hold the latter responsible for the company’s offences. It has been held by the courts that it cannot be said that a company cannot have a guilty mind inasmuch as the company’s mind is the mind of the persons controlling the company. In H.L. Botton (Engg.) Co. Ltd., v T.J. Grahams & Sons Ltd.15

FACTS OF THE CASE AS FOLLOWS:

1. In 1941, a limited company, T.J. Graham & Sons Ltd., builders’ merchants purchased with vacant possession an area of some six acres of land and the buildings thereon in Queen’s Head Road, Hands worth, Birmingham, as a new depot for their business. Owing to war conditions, they were unable to develop it at that date, and, accordingly, let the whole of the land and buildings to another company, Tubes Ltd., under a lease which enable either side after the war to determine it by three months’ notice. Tubes Ltd., used a good deal of the land themselves; but they sublet some of the buildings to a Mr. Bolton, precision engineer, as from 1941, under a lease which, in turn, was determinable by three months’ notice. In
1946 Mr. Bolton turned his business into a limited company. H.L. Bolton (Engineering) Co. Ltd., and his subtenancy was taken over by the limited company. The position, therefore, from 1946 to 1954, was that the superior landlord of the whole six acres was T.J. Graham & Sons Ltd.; the tenant of the whole was Tubes Ltd.; the subtenant of part namely, the buildings, was H.L. Bolton (Engineering) Co. Ltd.,

On July 22, 1954, T.J. Graham & Sons Ltd., by their secretary, gave notice to Tubes Ltd., to determine the tenancy on December 25, 1954. Their letter stated: "It is our intention to commence developing the above site at the early part of next year, and in these circumstances it is necessary for us to give you formal notice to determine your tenancy on December 25 next". That notice would have been effective at common law to have determined the tenancy of Tubes Ltd., but before that notice expired, on October 1, 1954, the Landlord and Tenant Act, 1954, came into operation. The effect of that Act was to render the notice to quit of no effect. The tenancy of Tubes Ltd., was varied by statute so that it could no longer be determined by three months' notice but only by a six months' notice of termination. A similar statutory variation was imported into the subtenancy between Tubes Ltd., and H.L. Bolton (Engineering) Co. Ltd.

The Ltd., however, did not take advantage of this new statutory variation. They thought that they were bound to go by reason of the existing notice to quit, and they went - not on December 25, 1954, when the notice to quit would expire, but a few weeks later, in January or February, 1955. They gave up the land which they occupied and they handed over everything, so far as they could, to the superior landlords, T.J. Graham & Sons Ltd. As a result of that surrender the intermediate tenancy
dropped out. The subtenants, H.L. Bolton (Engineering) Co. Ltd., became direct tenants of the superior landlords. T.J. Graham & Sons Ltd., and claimed that they were entitled to the protection of the Landlord and Tenant Act, 1954, in respect of the buildings which they occupied for their business.

The superior landlords still wished to get possession of the premises, because they wanted to develop the whole site as a depot for their business. Accordingly, on October 25, 1955, T.J. Graham & Sons Ltd., by their secretary, served a notice on H.L. Bolton (Engineering) Co. Ltd., to terminate their tenancy on April 26, 1956. That notice of termination compiled with the Act of 1954. At the same time, and in accordance with the Act, they gave notice to the tenants, H.L. Bolton (Engineering) Co. Ltd., that they would oppose an application to the court for the grant of a new tenancy, on the ground “that on termination of the tenancy we intend to demolish certain parts of the premises and reconstruct them and to occupy the whole of the premises for our own purposes”. On receipt of that notice, H.L. Bolton (Engineering) Co. Ltd., took the necessary steps to bring the matter to the court, claiming that they were entitled to a new tenancy. In answer, the landlords relied on two provisions of the Act to resist any new tenancy: (1) section 30 (1) (f), on the ground that they intended “to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction”; and (2) section 30 (1) (g), which enables a landlord to resist a new tenancy of the ground “that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein".
At the hearing in the country court, the tenant applicant company contended that the landlords, being a limited company, were unable to show that they had the necessary intention at any relevant date to establish their right to object to the grant of a new tenancy under section 30 (1) (f) or (g); and the following further facts became material to that question: The landlords, T.J. Graham & Sons Ltd., were a subsidiary of a bid company, the Associated Portland Cement Manufacturing Co. Ltd., which controlled the cement group of companies. T.J. Graham & Sons Ltd., had three directors, two of whom, Mr. Reiss and Mr. Ellison, were also directors of the Cement Marketing Co. Ltd. The third director of T.J. Graham & Sons Ltd., was a local director, a Mr. Tomkinson. Those three directors did not carry on business as a board. They did not have regular board meetings. They only held a board meeting once a year. Each of them individually played some part in the proposed development of this land: but they did not act collectively or as a board. On July 15, 1954, there was a meeting of the managing directors of the cement group of companies. Mr. Reiss, who was a director of T.J. Graham & Sons Ltd., and also of the Cement Marketing Co. Ltd., made a memorandum which was submitted to the meeting. The report of the meeting stated that: "Mr. Reiss's memorandum was considered and it was resolved to approve the development of Habdsworth Depot, at present owned by T.J. Graham & Sons Ltd., for use by the, and the Cement Marketing Co. Ltd., by the building of a new warehouse and office block, the conversion of existing buildings, etc., at a total cost of £ 60,000". In consequence of that decision, the notice to quit was given on July 22, 1954, by the secretary of T.J. Graham & Sons Ltd., to Tubes Ltd. Later on, the architect of T.J. Graham & Sons Ltd., Mr. Bloomer, proposed plans showing the nature of the work. He discussed the matter with the directors on several occasions. He saw the three directors about it. The directors met frequently and
discussed the development. They did not meet as a board and no vote or minute was taken, but those directors individually considered the matter, and went forward with it as a real project. Indeed, on the adjoining land of the company, they gave instructions for a great deal of work and entered into contracts on behalf of the company without any minute or resolution of the board at all. It was all part of the one development scheme. The directors and the architect were all of one mind about this development and the need to obtain possession of the premises.

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

451
But the Indian law has changed it has stated that the Directors and the managers who represent the directing mind and will of the company, held equally liable for criminal complaint they also must be prosecuted for the act committed on behalf of the company was stated in the case of Dharma pratishthan v B. Mandal.18

FACTS OF THE CASE AS FOLLOWS:

The petitioner-Society filed an appeal before the Income-tax Appellate Tribunal and before the Tribunal could decide the appeal, the Inspecting Assistant Commissioner in the basis of the remand order made an assessment order on March 24, 1987, determining the income of the petitioner-Society to the tune of Rs. 1,34,65,810/- A criminal complaint was instituted in March 1987 after obtaining the necessary authorization under Section 279 (1) of the Income-tax Act. I would refer to the contents of the complaint a bit later. In order to complete the happenings, I may mention that the Appellate Tribunal vide its order dated June 18, 1987, held that the Commissioner of Income-tax was not right in remanding the case and it directed the Commissioner of Income-tax to decide the appeal against the first assessment order afresh. A finding was given that the Commissioner of Income-tax had not cared to examine the reasons on the basis of which the appeal was filed against the assessment order and had raised certain suspicious regarding the sources of income of the petitioner-Society which were not the basis or original assessment order and no show cause having been given to the petitioner-Society as to why the assessment be not enhanced and thus, it had acted with an error in jurisdiction in not deciding the appeal on merits and in reminding the case back to the Inspecting Assistance Commissioner for re-assessment. It is
now evidence that the original assessment order is still intact and an appeal filed against that order is yet to be decided by the Commissioner of income-tax.

The short question which has been raised by the petitioners in seeking quashment of the criminal proceedings is that as soon as the re-assessment order had become redundant due to appellate order being set aside by the Tribunal which has resulted in reviving of the appeal against the first assessment order, the criminal complaint which has been filed on the basis of the re-assessment order is no longer tenable as that re-assessment order stand automatically set aside. There is a fallacy in this contention of the petitioners because the criminal complaint is not based on assessment orders.

It has been mentioned in the criminal complaint that in the income-tax return filed by the petitioner-Society showing a deficit of huge amount, the petitioner Society had claimed Rs. 75,00,000/- as hotel expenses. Rs. 0,00,000/- as mess expenses and Rs. 5,00,000/- as payments made for ants. During the course of the assessment proceedings, documents filed y the petitioners were examined and evidence was collected which revealed that the alleged payments of Rs. 5,18,845/15 P and another mount of Rs. 15,210/35 P were not made to Ashoka Hotel as claimed in expenditure account and the said amounts had been included just to inflate the expenses. Similarly, certain amounts claimed as expenditure as payments made to Lodi Hotel were also found to be false and them certain amounts allegedly paid to M/s. Karachi Taxi Company were also found to be not made. Similarly, expenditure allegedly incurred in the shape of payments made to some Vedic Pundits were found to be not actually made and then certain amounts shown as spent on conveyance charges was
found to be false. So, huge amounts claimed as expenditure by the petitioner-Society in evidence were found to be false and were stated to have been intentionally included in the return to inflate the figures in order to escape the taxation of income. The complaint was filed against the Society and its President, Vice President, Secretary and the two accountants. The petition as been moved for quashing of the criminal proceedings by the Society and Anand Srivastava and Ajay Prakash, i.e., the Vice-President and the Secretary of petitioners No. 1. In the complaint it has been mentioned that petitioner No. 1 and the other accused had themselves made or caused to be made false entries and statements in its books of accounts, other documents filed along with the return of income in order to cause circumstances to exist which would have the effect of enabling petitioner No. 1 to evade income-tax etc., and that all the accused have been in possession and control of the books of accounts and other documents containing the false entries and false statement relating to the aforesaid expenses and thus, all the accused had committed an offence punishable under Section 276-C (1) of the Income-tax Act and moreover the accused No. 1-Society through accused No. 2 President had made a statement in verification in the form of return of income-tax while accused Nos. 2 to 6 delivered accounts and statements signed by them on behalf of the Society which were false which they knew or believed to be false or did not believe to be true and thus, committed an offence punishable under Section 277 of the Income-tax Act. It is further alleged that the accused Nos. 2 to 4 were managing and controlling the Society and were looking after the day-to-day business of the Society and they were also signing the documents on behalf of the Society and thus they are all liable to be proceeded against under Section 278-B of the Income-tax Act and similarly, accused Nos. 5 & 6 who are the officers of the Society had been signing and filing documents and statements on behalf of the Society and
thus they have committed the offences in connivance with the others or at any rate they have been extremely negligent in discharge of their obligations in this behalf and thus, they are liable to be punished under Section 278-B (2) of the Income-tax Act.

Now the ingredients of the offences covered by the aforesaid provisions of the Income-tax Act have nothing to do with the actual assessment orders. It is only where from the evidence collected, the Inspecting Assistant Commissioner finds that prima-facie the accused have committed offences mentioned in those sections that after taking necessary authorization he can file a criminal complaint. The assessment by itself is not the basis of the complaint. In the present case even if the re-assessment order had become invalid the fact remains that the original assessment order still remains in force and an appeal filed against that order is yet to be decided on merits.

It was held that if any offence involving menders is there, the company can be found guilty of such an offence as quality mind of the persons controlling the said company itself. The observations pertaining to the said case, which are pertinent, are as follows:

"The counsel for the Crown contended that a limited company, like any other entity recognized by the law can as a general rule be indicted for its criminal acts which from the very necessity of the case must be performed by human agency and which in given circumstances become the acts of the company. The court of appeal accepted the submission of the Crown and dismissed the appeal".
Prosecution of directors sans the company,

Under this provision, besides the company concerned, the individuals who are in charge of and responsible to the company for the conduct of its business are vicariously liable for the offences committed by the company. The words “as well as the company” indicate that for offences committed by a company itself as well as the individual concerned are liable to be prosecuted and to consequential penalty.

In Vidyawati v State17

Facts as follows:

In the instant case, the police filed the challan against all the accused, namely, a partnership firm, three partners and others. The prosecution case was that the partnership firm had sold levy cement at the rate of non-levy cement; that there was shortage of cement bags of levy cement; and an excess of non-levy cement; and that the accused had maintained duplicate sales register and cash memo books of non-levy cement, each one of which was allegedly maintained in contravention of the provisions of the Delhi Cement Licensing and Control Order, 1982, punishable under section 7 of the Essential Commodities Act, 1955. The prosecution case, therefore, was that the firm had committed the offence in question for the alleged violation; and the three petitioners being partners of the firm, should also be deemed to have committed the offence. It was not the case of the prosecution that these persons committed the violations in question personally and individually. The question before the Court was whether, on the facts, the prosecution of the petitioners could be sustained in law.
The Delhi High Court has held, in the context of offences under the Essential Commodities Act, 1955, which contains the aforesaid, penal provision in its section 10, that the individuals concerned alone cannot be prosecuted without prosecuting the company.

In another case M.L. Lakhotia v. State 18

FACTS as follows:

The petitioner directors in a company were sought to be prosecuted for an offence punishable under section 22 read with sections 48 and 53 of the MRTP Act, 1969. The allegation against the company was that it had established a new unit without the permission of the Government. The question was whether the Courts in Delhi had jurisdiction to try the petitioners for the aforesaid offence; particularly, when this new unit was admittedly being established in the State of Maharashtra. The other question before the Court was whether, on the facts, the petitioners who were directors of the company, could be liable when the company itself had not been prosecuted.

The offence under section 22 of the MRTP Act, 1969, is the establishment of a new unit; and this is admittedly being established within the State of Maharashtra. Under the above section, the establishment of a new unit without the permission of the Government is an offence, which will always be tried by a Court within whose jurisdiction it is committed. The simple fact that the authority that is required to accord permission is situated in Delhi does not confer any jurisdiction on the Courts at Delhi.

457
Here, it is the common case of the parties that the unit has been established in contravention of section 22 of aforesaid Act within the State of Maharashtra. The offence as such would, therefore, be triable within the jurisdiction of the Court where it is committed.

The apart, in the complaint itself, it is clearly mentioned by the complaint that the petitioners are being prosecuted, as they are held vicariously liable for the offence committed by the company. If the company is not prosecuted or punished, the petitioners under section 53 of the said Act cannot also be held liable. Accordingly, on the facts, the prosecution of the petitioners was held to be an exercise in futility.

The view expressed by the High Court in two cases cited above, did not, however, reflect the correct position in law as laid down by the Supreme Court in its decision, Sheoratan Agarwal v. State of Madhya Pradesh, 19 wherein the Supreme Court explained its decision in C.V. Parekh case (supra) and held that it is not necessary that along with or before the directors are prosecuted, the company should also be prosecuted.

Company law in the Commonwealth

Of the present or former Commonwealth countries, most of them, having started with the UK model and been subject to the decisions of the UK House of Lords, have developed their own legislation and judicature. In Canada the ultra vires rule has been dropped and Australia has been experimenting with alternative forms of insolvency procedure. Australia has also greatly simplified its procedure for protecting minority rights. Australian company law is also keen on the use of “plain English” so that ordinary investors can understand what their companies are doing with
New Zealand has been particularly innovatory in the field of company law, reflecting a political desire to reduce the role of the state in personal and business matters. Many companies are not required to file accounts unless they are offering shares to the public. Annual reports need not be filed with Companies House. There are no residence or nationality requirements for directors and no obligation to have a company secretary. While this amount of deregulation may well attract entrepreneurs, it also means that creditors and investors must be on their guard when dealing with companies that provide so little information about themselves.

Comparison of UK companies with companies in other jurisdictions

Although the terms may be different, most developed countries have limited companies and a system of company registration in many respects similar to those in Europe, the Commonwealth and the USA. In some countries there is no distinction between the memorandum and articles, as those documents are amalgamated in one document called "by-laws" or "statutes". Most countries have shares, debentures and the concept of limited liability, though many countries make greater use of limited partnerships. Some countries have no insider dealing rules or despite being highly advanced economies, have only introduced them recently. Japan being a good example.

Company law in developing countries and in the former Iron Curtain countries

For countries that never had a company law because private enterprise was forbidden by their socialist rulers, it has been necessary to invent a new company law. This is particularly true for some of the former Iron Curtain countries. Such countries have usually taken advice as to
what is the most suitable type of company law for their cultural and commercial traditions. As stated above, the German model is admired, particularly in some of the former Eastern Bloc countries, for its employee involvement. Some such countries are being assisted by help from the UN and other international bodies in drafting and developing modern corporate and commercial laws. Such laws will encourage outside investment by not being markedly different from most other countries' commercial and corporate laws. Such countries are sometimes in the difficult position of not wishing to be seen uncritically to adopt wholesale other countries' ideas (since that suggests they are unable to do it themselves) but equally not wishing to embark upon costly corporate experiments which may not work. Yet it is sensible to adopt commercial and corporate legal practices which are seen to work well elsewhere. In addition, many developing countries look to the US models of corporate law because US investment is seen as desirable, particularly if that country has a high record of emigration to the USA. Returning emigrants, or their children, may wish to bring capital back to the land of their forebears but will not do so unless they know their investment will not be expropriated under an obscure legal system. At the same time many countries specifically have commercial and corporate laws that restrict the involvement of foreigners in companies or the movement of capital out of the country. This is to protect their own economies though it may also have the unintended effect of deterring investment.

There is also the considerable risk of fraud. In some countries, such as Russia, many industries have been privatized. The new owners and managers of the industries are often the same as the former managers. They alone understood the industry, how it worked, and where strongly able to influence the price at which the industry's shares could be sold –
and indeed to whom the shares could be sold. An inexperienced, not always very numerate electorate and parliament, combined with corrupt officialdom and an underpaid judiciary, is not always alert to conflicts of interest or the possibilities for secret profits. Auditing can be

**Whither company law into the 21st Century?**

Earlier this century directors generally were in a very privileged position, only marginally accountable and rarely liable for their own incompetence. While this is still true to some extent, the law in the UK has been gradually reducing their relative impunity. Their continued relative impunity in listed companies now derives from block votes from supportive institutions; and it may be that methods will be found to make directors more responsive to other shareholders' views. This whole area is known as corporate governance and is the subject of much debate.

A current, and some would say, idealistic popular view is that the law should be revised to take account of the interest of other stakeholders (employees, the public interest, environmental concerns, consumers), rather than being a method for facilitating a good return for shareholders' investment. This would, it is suggested, and if properly drafted, lead to greater commitment, longer term rewards, better morale and productivity. It might also lead to slow decision making, while managers play divide and rule between the competing interests.

Insider dealing is never going to disappear, but the law could undoubtedly be improved to minimize the possibilities of both carrying it out and not getting caught. It is also likely that increased electronic
monitoring of transactions will gradually make it more and more difficult to carry out successful insider deals.

It is possible that company law will follow the New Zealand model and become progressively less regulated, and equally possible that after a number of years consumer pressure will force company law to revert to a more regulated environment. It is also possible that we may see a global consensus on what form of corporate law (and what form of accounting) is suitable for companies that offer their shares to the public. Private companies will probably continue to have varying degrees of regulation.

It is unlikely that any corporate legal system would satisfactorily resolve all these competing demands upon the corporate structure. As stated above, company law is all about finding the requisite balance. This is the challenge for the next century's legislators.

**What lesson we can learn or what way Indian Law is better.**

In India a company may be incorporated either by special statute or by registration under the companies Act for the time being in force.

Incorporation helps the property of the company to be clearly distinguished from that of its members. The property is vested in the company as a corporate and no changes of individual membership affect the title. The property remains vested in the company whereas the shareholders may come and go but the company may convey, assign, mortgage or otherwise deal with it. In other words, the property of the company is not the property of shareholders; it is the property of the company.
As stated earlier, shareholders have no direct concern with the management of the company. They exercise only a formative control. Thus the management of the company is altogether different from its ownership. Independent functioning of managerial personnel attracts talented professional persons to work for the company in an atmosphere of independence thus enabling them to achieve highest targets of production and management leading to company’s overall prosperity.

The management of the company generally vests in the directors who decide the policy matters in the meetings of the Board of Directors. The tenure of director’s office is five years so as to ensure flexibility in management and eliminate the possibility of Board misusing its powers. With skilled professional managers supported by financial resources, Companies are able to develop and carry on their business efficiently. In short, professional form of management of business disassociates the ownership from control of business and thus help’s to promote efficiency. Besides, it provides flexibility and autonomy to business undertakings within the framework of company law.

The provision contained in Section 77(1) of the Companies Act, 1956 prohibits a company with limited liability from purchasing its own shares subject to certain exceptions. This ensures permanence of capital raised by the company, which in turn provides its stability, and at the same time protection to the creditors of the company to certain extent.

One of the advantages of incorporated company is that it affords an opportunity to even a common man with meager resources to invests a little part of his income in the company’s capital through purchase of
shares or debentures without being exposed to substantial loss in the event of failure of company's business. The company too, on its part, can borrow money and raise its capital on debentures, which an ordinary trader cannot do. Any member of a company acting in good faith, is as much entitled to take and hold company's debentures as any outside creditor. Thus, incorporation of companies seeks to fulfill the desire of common men who do not intend to directly participate in the business because of the risk involved therein, but wish to invest a part of their income in business ventures to earn profit.

In United Kingdom a company may also be incorporated by royal charter which is perhaps the oldest mode of incorporation known to English Law.

In our system of company Law the supervisory board is made up of the representatives of the shareholders and of the employees, the number of the employees, representatives increasing according to the extent of the workforce. The representatives are elected by the shareholders and the employees respectively. It is their Job to supervise the managing board stricter professional standards are expected of such managers than are expected of directors of U.K. Companies.

It is sometimes said that in the U.K. Co-ordinary non-institutional shareholders interest and employee's interest are ignored by the directors. With all this point we may come to the conclusion that our Law is the best law, to govern the companies rules and regulations.
FOOT NOTE:

1. 1985 S 14
3. Com Act 1985 S 242
4. Comp Act 1985
5. Com law by Paranjappa
6. Comp Act 1985 S 284
7. The European union and U.K Company law
8. U.K Company law by Nicholas Grier
10. 1969 Comp LJ. P 87
11. 1916 1 ALL ER P 285
12. 1972 2 ALL ER P759
13. Classification of Business Organization U.K company law by BRIAN'R CHEFFINS
14. 1987 Comp LJ P 91
15. 1957 1 QB 159
17. 1989 Cri LJ 1047.