

FARAD CONTINUATION SHEET
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CIVIL APPLICATION (CAO) NO.1287 OF 2016
IN
PUBLIC INTEREST LITIGATION NO.56 OF 2016.

Shahbaz Abrar Siddiqui ..vs.. The State of Mah. and others.

Office Notes, Office Memoranda of
 Coram, appearances, Court's orders
 or directions and Registrar's orders.

Court's or Judge's orders

Mr.S.P.Bhandarkar, Adv. for the petitioner.
 Mr.S.M.Puranik, Adv. for respondent no.3.
 Mr.Sunil Manohar, Senior Advocate with
 Mr.A.A.Naik, Advocate for respondent nos.7, 8 to 13.

CORAM : B.R.GAVAI AND
V.M.DESHPANDE, JJ.
DATE : JULY 28, 2016.

1. This application is filed on behalf of the respondent nos.8 to 13 who have been impleaded as such in the cause title of the petition.

2. The petition has been filed making a grievance that the respondent No.7 – Company while executing the work of laying optical fiber cables has dug trenches and in a casual manner neglected to safeguard the said trenches. It is the grievance of the

petitioner that on account of that, two-year-old child fell into an unguarded ditch and succumbed to death. It is therefore the contention of the petitioner that an offence punishable under Sections 304-A, 336 and 337 of the Indian Penal Code are made out and the respondent no.7 to 13 are liable to be prosecuted for the same.

3. An application has been filed in the said petition contending therein that the respondent nos.8 to 13 are not at all concerned with the aforesaid incident. It is submitted that, therefore relief as claimed against the respondents nos.8 to 13 cannot be sought in the petition.

4. We have extensively heard Shri S.P.Bhandarkar, the learned counsel appearing on behalf of the writ petitioner and Shri Sunil Manohar, the learned Senior Counsel appearing on behalf of the applicants/respondent nos.8 to 13.

5 The learned Counsel Shri Bhandarkar with full whims has submitted that the law has now undergone substantial changes

and that the old legal position that the Companies/Corporations cannot be held liable for act/negligence on their part is no more a good law. The learned counsel further submitted that the law is organic and with the revolution of law it is now the legal position that even the companies are liable for criminal actions and the Directors are also liable for the offences committed by the Company. The learned counsel relies on the judgment of the Apex Court in the case of *Sushil Ansal ..vs.. State through C.B.I.,* reported in 2014 SC 190 and in the case of *Iridium India Telecom Ltd. ..vs.. Motorola Incorporated and ors.,* reported in (2011)1 SCC 74 in support of submissions made by him.

6. Per contra, Shri Sunil Manohar, learned Senior Counsel has submitted that even accepting for a moment that the Company is liable to be prosecuted, the respondent nos. 8 to 13 cannot be held to be vicariously liable for the act/negligence on the part of the Company merely because they are the Directors of the Company. The learned Senior Counsel further submitted that it is not even a whisper in the petition as to what act has been done by the respondent nos.8 to 13 or as to what is the omission

on their part which would make them liable for prosecution. The learned Senior Counsel has further submitted that the unless there are specific allegations against the individuals as to what act or what inaction on their part would amount to criminal negligence, the relief claimed in the petition cannot be granted.

7. Undisputedly, the very thrust of the petition is that on account of trenches dug by respondent no.7 – Company and since respondent no.7 failed to safeguard the said trenches, a small girl was led to death. At the outset, we may make it clear that at this stage we are not concerned with the role of respondent no.7. We are only considering the application on behalf of respondent nos.8 to 13 who are the Directors of respondent no.7 – Company. To appreciate the rival submissions it will be appropriate to refer to Section 304-A, Section 336 and 337 of the Indian Penal Code. The perusal of all these Sections would reveal that to constitute an offence under any of the aforesaid three Sections, a person is required to do any rash or negligent act.

It could thus be seen that the very import of aforesaid Sections depends on the rash and negligent act by a person. No

doubt that, even a neglect to do something which a prudent man is required to do and leading to the consequences as provided in the aforesaid three Sections may also constitute an ingredients of the aforesaid three Sections. As such it would be clear that for attracting the provisions of aforesaid Sections, there will have to be a specific role attributed to an individual of doing any rash or negligent act, or, at least, there will have to be an assertion that a person who was required to do something in law, and on account of neglect by him to do that act, it will lead to the consequences as provided in the aforesaid three Sections.

8. We had requested the learned counsel for the petitioner to point out any such averements made either in the complaint to the police or in the memo of the petition attracting such act or neglect personally to the respondent nos. 8 to 13. However, the learned counsel has not been in a position to point out any particular averement either in the complaint or in the memo of petition. The thrust of the argument as we could understand with our limited understanding of law, is that even if there are no such allegations either in the complaint or in the

petition, merely because the individuals are the Directors of the Company can prima facie be held liable for the aforesaid offences and can be prosecuted for said offences.

9. We would make an attempt to consider the judgment relied on by the learned counsel for the petitioner to find out as to whether the legal assertion as made by the learned counsel for the petitioner stands supported from the aforesaid two judgments or not.

In the case of *Sushil Ansal* which is popularly known “*Uphaar Cinema Case*”, the two Directors namely Sushil Ansal and Gopal Ansal were held guilty for the offence punishable under Section 304-A of the Indian Penal Code by the Trial Court. The said Conviction was upheld by the High Court. The said was challenged before the Hon'ble Apex Court and argument was advanced in an appeal before the Hon'ble Apex Court by the said two Directors that they were prosecuted as Directors of the Company and therefore by virtue of vicarious liability they could not have been prosecuted. The argument advanced was that the

building was owned by the Company and not by the said two brothers.

The Hon'ble Apex Court observed while confirming the conviction as recorded by the Court below, as under:-

“120. The question then is whether the negligence of Ansal brothers-the occupiers of the cinema was so gross so as to be culpable under Section 304-A of the IPC. Our answer to that question is in the affirmative. The reasons are not far to seek. In the first place the degree of care expected from an occupier of a place which is frequented everyday by hundreds and if not thousands is very high in comparison to any other place that is less frequented or more sparingly used for public functions. The higher the number of visitors to a place and the greater the frequency of such visits, the higher would be the degree of care required to be observed for their safety. The duty is continuing which starts with every exhibition of cinematography and continues till the patrons safely exit from the cinema complex. That the patrons are admitted to the cinema for a price, makes them contractual invitees or visitors qua

whom the duty to care is even otherwise higher than others. The need for high degree of care for the safety of the visitors to such public places offering entertainment is evident from the fact that the Parliament has enacted the Cinematography Act and the Rules, which cast specific obligations upon the owners/occupiers/licensees with a view to ensuring the safety of those frequenting such places. The annual inspections and the requirements of No Objection Certificates to be obtained from authorities concerned is yet another indicator of how important the law considers the safety of the patrons to be. Any question as to the nature and the extent of breach must therefore be seen in the backdrop of the above duties and obligations that arise both under the common law and the statutory provisions alike. Judged in the above backdrop it is evident that the occupiers in the present case had showed scant regard both for the letter of law as also their duty under the common law to care for the safety of their patrons. The occupiers not only committed deviations from the sanctioned building plan that heightened the dangers to the safety of the visitors but continued to operate the cinema in contemptuous disregard for the requirements of law

in the process exposing the patrons to a high degree of risk to their lives which some of them eventually lost in the incident in question. Far from taking any additional care towards safety of the visitors to the cinema the occupiers asked for permission to place additional seats that further compromised the safety requirements and raised the level of risks to the patrons. The history of litigation between the occupiers on the one hand and the Government on the other regarding the removal of the additional seats permitted during national emergency and their opposition to the concerns expressed by the authorities on account of increased fire hazards as also their insistence that the addition or continuance of the seats would not affect the safety requirements of the patrons clearly showed that they were more concerned with making a little more money out of the few additional seats that were added to the cinema in the balcony rather than maintaining the required standards of safety in discharge of the common law duty but also under the provisions of the DCR 1953.”

It could thus be seen that the Apex Court in a clear terms on

the basis of the evidence that was led before the Court came to the conclusion that the said *Ansal* brothers were the occupiers of the place. It has been further observed that the higher degree of care was expected from the said two brothers who had occupiers of the building. It was further found that the occupiers *Ansal* brothers had not only committed deviation from the sanctioned building plan that heightened the dangers to the safety of the visitors but continued to operate the cinema in contemptuous disregard for the requirements of law in the process exposing the patrons to a high degree of risk to their lives. The Court further, on facts, found that the said *Ansal* brothers would have to take additional care towards safety of the visitors of the cinema instead they asked for permission to place additional seats that further compromised the safety requirements and raised the level of risks to the patrons.

10. It was further found that inspite of the opposition on behalf of the Government to increase the seats which had increased the risk of fire hazards they insisted to continuance of the additional seats. The Court on the basis of the evidence found

that the said occupiers were not concerned with the safety of the visitors but were only interested in getting profits.

11. It will further appropriate to refer to the following observations of the Apex Court.

“75. We may now advert to the second and an equally, if not, more important dimensions of the offence punishable under Section 304-A Indian Penal Code, viz. that the act of the accused must be the proximate, immediate or efficient cause of the death of the victim without the intervention of any other persons's negligence. This aspect of the legal requirement is also settled by a long line of decisions of Courts in this country. We may at the outset refer to a Division Bench decision of the High Court of Bombay in Emperor .v. Omkar Rampratap (1902)4 Bom L.R. 679.”

It could thus be seen that the Apex Court has in clear terms held that for bringing home an offence under Section 304-A of the Indian Penal Code, it will have to be shown that the act of the accused must be

the proximate, immediate or efficient cause of the death of the victim without the intervention of any other person's negligence.

12. It could thus be seen that in the case of *Sushil Ansal* (cited supra) on the basis of the factual position as was established by evidence on record, the Court came to the conclusion that the Ansal brothers were the occupiers of the building and that the duty was cast upon them to take due care for providing safety measures. It was found that leave apart providing adequate safety measures they were more interested in increasing the seats though the Government has opposed to increase of the seats as it would result in the risk of fire hazards. It was found that this was done only in order to earn more profit. It was further found that the occupiers had indulged in installing the transformers and letting the shops to the other occupiers which increased the safety risk. In this background, Their Lordships have held that occupiers were liable to be held guilty for the offence punishable under Section 304-A of the Indian Penal.

13. At the costs of repetition, in the present case, there is not a single averment as to what act or as to what negligence on the part of

respondent no.8 to 13 has led to the death of the unfortunate child.

14. The next judgment which relied on by Shri Bhandarkar is in the case of *Iridium India Telecom Ltd. ..vs.. Motorola Incorporated and ors.* (cited supra). The question that arose for consideration before Their Lordships of the Apex Court was, as to whether a Company can be prosecuted for an offence of cheating wherein one of the essential ingredients was *mens rea*. It is argued before the Hon'ble Apex Court that Company is a juristic person and does not have mind of its own and therefore it cannot be prosecuted for an offence which requires *mens rea*. Their Lordships reiterated the said contention and while following the judgment of Constitution Bench in *Standard Chartered Bank ..vs.. Directorate of Enforcement* observed in paragraph No.64, as under :-

“6. There is no dispute that a company is liable to be prosecuted and punished for criminal offences. Although there are earlier authorities to the effect that corporations cannot commit a crime, the generally accepted modern rule is that except for such crimes as a corporation is held incapable of committing by reason of the fact that they involve

personal malicious intent, a corporation may be subject to indictment or other criminal process, although the criminal act is committed through its agents.”

15. No doubt that Mr.Bhandarkar is right in contending that the Law is organic and has developed with passage of time. He is also right in contending that even for a criminal offence requiring *mens rea* the Company can be prosecuted. However, we find that the said judgment nowhere suggests that for offence committed by the Company, all its Directors can also be vicariously made liable.

16. We have persistently requested Shri Bhandarkar to show the judgment of the Hon'ble Apex Court wherein it is held that for an offence committed by a Company the Directors, against whom no specific allegations are made, can also be vicariously held guilty. We had even told him that in order to avoid wastage of his valuable time if he shows the judgment, we will throw the application of the respondent nos.8 to 13 within a minute. However, though he has brought our attention to various passages of the aforesaid two judgments, we could not come across any part which would even

remotely support the aforesaid proposition.

17. We find that the law on the issue is well settled. The Apex Court in the case of **S.K.Alag ..vs.. State of Uttar Pradesh and ors.** reported in **(2008)5 SCC 662** has observed as under :-

“16. The Penal Code, save and except some provisions specifically providing therefor, does not contemplate any vicarious liability on the part of a party who is not charged directly for commission of an offence.”

We find that the aforesaid view, as could be found in the judgment of the Apex Court in the case of S.K.Alag, is diagonally opposite to the proposition of law as advanced by Advocate Shri Bhandarkar.

18. It will also be relevant to refer to the observations of the Hon'ble Apex Court in the case of **M/s Thermax Ltd. and ors. ..vs.. K.M.Johny and ors.** reported in **2011(11) SCALE 128**, which are as under :-

“21. Apart from the fact that the complaint lacks necessary ingredients of Sections 405, 406, 420 read with Section 34 IPC, it is to be noted that the concept of 'vicarious liability' is unknown to criminal law. As observed earlier, there is no specific allegation made against any person but the members of the Board and senior executives are joined as the persons looking after the management and business of the appellant-Company.

22. It is useful to demonstrate certain examples, namely, Section 141 of the Negotiable Instruments Act, 1881 which specifically provides that if the person committing an offence under Section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Likewise, Section 32 of the Industrial Disputes Act, 1947 provides that where a person committing an

offence under this Act is a company, or other body corporate or an association of persons, every director, manager, secretary, agent or other officer or person concerned with the management thereof shall, unless he proves that the offence was committed without his knowledge or consent, be deemed to be guilty of such offence. We have already noted that the offence alleged in the criminal complaint filed by respondent No.1 is under Sections 405 and 420 IPC whereunder no specific liability is imposed on the officers of the company, if the alleged offence is by the Company. In the absence of specific details about the same, no person other than appellant No.1 – Company can be prosecuted under the alleged complaint.”

19. It could thus be seen that the Apex Court has in clear terms held that the concept of vicarious liability is unknown to criminal law. It has further been observed that there is no specific allegation made against any person but the members of the Board and senior executives are joined as the persons looking after the management and business of the company. Shri Manohar, the learned Senior

Counsel, has already relied on two judgments delivered by one of us (B.R.Gavai, J.) in the cases of Arvind Navinchandra Mafatlal and anr. ..vs.. Palakyavalli Joseph Thomas and ors. reported in 2010(4) ABR (NOC) 385 (Bom.) and Pramod Parmeshwarlal Banka and Etc. ..vs.. State of Maharashtra and anr. reported in 2011(5) AIR Bom.R. 679.

We find that the reference to those judgments would not be necessary, inasmuch as though the said judgments take the same view, when the law is clearly enumerated by the Apex Court the reference to the judgment of this Court would only be making the judgment bulkier. In the result, we find that the joining of the respondent nos.8 to 13 was not proper. No relief as sought against them can be granted in the present proceedings. The application is, therefore, allowed. The respondent nos.8 to 13 are directed to be deleted from the array of the respondents.

JUDGE

JUDGE

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CERTIFICATE

I certify that this Order uploaded is a true and correct copy of original signed order.

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