

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPLICATION NO.498 OF 2021

- 1) Brijesh Kanubhai Patel,
Age-41 years, Occu:Business,
- 2) Viramgama Kishorkumar Virji,
Age-62 years, Occu:Business,
- 3) Rangani Bhovan Parshottam,
Age-64 years, Occu:Business,
- 4) Kakkad Jaykrishna Devchandbhai,
Age-46 years, Occu:Business,

Having office at Montecarlo House,
Sindhu Bhavan Road, Bodakdev,
Ahmedabad, Gujarat,

- 5) Anilkumar Anantlal Das,
Age-50 years Occu:Service,
R/o-Sahayogi Nagar, Near Big Bazaar,
Sector-2, Nichitpur, Dhanbad, Saraitela,
Jharkhand, Currently residing at
Near Nagewadi, Jalna,
- 6) Jagjit Singh S/o Ujagar Singh,
Age-53 years, Occu:Business,
R/o-Wadeshwar Nagar, Wadgaon Sheri,
Pune, Currently residing at
Nagewadi, Jalna.

...APPLICANTS

VERSUS

- 1) The State of Maharashtra,
Through Police Inspector,
Badnapur Police Station,
Tq-Badnapur, Dist-Jalna,
- 2) Pandurang Shivhari Kekane,
Age-About 42 years,
R/o-At Post-Akola,
Tq-Badnapur, Dist-Jalna.

...RESPONDENTS

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Mr.Avinash Gupta, Senior Advocate assisted by Mr.S.V. Adwant Advocate and Mr. Manish Shukla Advocate for Applicants.
Mr.Y.G. Gujarathi, A.P.P. for Respondent No. 1 – State.
Mr. J.V. Deshpande Advocate with Mr.V.B. Madan Patil Advocate for Respondent No.2.

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**CORAM: SUNIL P. DESHMUKH AND
NITIN B. SURYAWANSHI, JJ.**

DATE OF RESERVING JUDGMENT : 2nd SEPTEMBER, 2021

DATE OF PRONOUNCING JUDGMENT : 16th SEPTEMBER, 2021

JUDGMENT [PER SUNIL P. DESHMUKH, J.] :

1. Applicants have approached this Court invoking section 482 of the Code of Criminal Procedure, seeking quashing of first information report bearing No. 0338 dated 26th August 2020 lodged with police station, Badnapur in District-Jalna, for the offences punishable under section 304 read with section 34 of the Indian Penal Code and sections 3 and 4 of the Mines and

Minerals (Development and Regulation) Act, 1957 (for short "the Mines and Minerals Act").

2. On 26th August 2020 respondent No. 2 – the informant lodged a report with police station, Badnapur, District-Jalna. Statements in the first information are to the effect that informant's son Deepak (Shepherd), 16 year old boy had been taking goats for grazing through *Dudhna* river as usual along with his friends, who too were shepherds, bearing names – Santosh Shinde, Anil Mundhe. The informant received a phone call around 3.15 p.m. from one Shriram Nagare that his son Deepak died drowning in a ditch under 'glass' tree (माढुका). He immediately went to the spot. With the help of one Salman Rajjak Pathan, his son had been taken out of the water. He alleges that on inquiry, the villagers viz. Babasaheb Bhausahab Mundhe, Sharad Bhaskar Gite, Mahadu Aabaji Gite, Tejrao Nathaji Gite, Udhav Jagannath Gite and others, told him that contractors of Montecarlo Company, namely, Brijesh Patel, CPM Anilkumar, Jaikrishna Kakkad, digging with the aid of machinery, had illegally excavated sand, gravel, macadam from *Dudhna* river bed, for the construction of '*Samruddhi*' Expressway,

causing ditches endangering human life. For the same, Brijesh Patel, CPM Anil Kumar, Jagdishsingh, Kishor Virji, Bhovan Rangani, contractors of Montecarlo Limited and Iron Triangle Limited are responsible and the same has caused death of his son Deepak, aged about 16 years and request for registering offence as referred above against these persons has been made.

3. Learned senior advocate Mr. Avinash Gupta appearing with learned advocate Mr. S.V. Adwant and Mr. Manish Shukla, contends that, factually, the applicants are not concerned at all with the ditches referred to in the first information report, much less applicants are personally involved in any such work. It is being referred to that a segment of Mumbai-Nagpur Super Expressway is being constructed through joint venture of Montecarlo Limited and Iron Triangle Limited at a distant place from the spot of incident. The work is being got done from sub-contractors through their employees. The sub-contractors have authorization of the appropriate authorities for an arrangement for supply of raw material from a spot far away from the place of incident. He contends that the applicants are

absolutely unconcerned and unrelated with the incident and / or commission of alleged offence or otherwise.

4. Learned senior advocate Mr. Gupta goes on to submit that no cognizance of alleged offence against the applicants could have been taken. He submits that even assuming that the allegations in the first information report are correct, yet offence under section 304 of the Indian Penal Code cannot be attributed to them. If the allegations are read, stretching them far, it may bring out a case at the most attracting section 304-A and in any circumstances section 304 of the Indian Penal Code cannot be invoked.

5. Learned senior advocate submits that aforesaid apart, the incident allegedly had taken place on 30th July 2020 and first information report has been lodged on 26th August 2020. This huge time gap speaks many things and the applicants have been arraigned with an oblique motive and to harass them, to wrench unlawful gains from them. He submits that there is no reason in the first information report for huge time gap between the incident and lodging of the first information report. The complaint has been filed, as referred to, to exert pressure on the

applicants to accede to unlawful demands at the behest of ex-political heavy weight.

6. He submits that the most crucial is that under criminal jurisprudence, vicarious liability cannot be fastened onto the applicants, who are the directors and employees of the joint venture. He submits that perusal of the first information report would reveal that it is based on hear-say that death has been caused due to digging of pit by the contractor to whom the work of road construction is allotted. The allegations are purely surmises and conjectures. The applicants have been falsely roped in the alleged commission of offence to which they have not been even remotely concerned nor it can be said that any *prima facie* case has been made out against them.

7. He submits that present applicants are neither the applicants nor recipients of any permission of sand mining along *Dudhna* river nor are involved in any such mining activities. He purports to point out that district level monitoring system, mine surveillance system, district flying squad, drone surveillance system, tahsil vigilance system, tahsil flying squad have never concluded any illegal excavation by joint venture concerns. He

contends that place of incident is at a long distance of 2.18 kilometers from the work of applicants joint venture.

8. Learned senior advocate goes on to submit that there have been number of incidents of drowning in *Dudhna* river wherein lot of people have lost their precious lives due to negligence. People, without taking proper care, get into rapidly flowing river streams for swimming and get drowned. The incident cannot be attributed to applicants. Under surmises and conjectures, applicants' liberty and fundamental rights have been casually put in peril by lodging first information report as aforesaid.

9. Learned senior advocate submits that even if the allegations in the first information report are taken on their face value, no cognizable offence against the applicants can be said to be made out. The complaint is a result of *mala fides* and malice and the same is lodged with ulterior motive and as a tool to coerce the applicants to accede to demands for unlawful gains. It is submitted that the complaint is false, frivolous, vexatious, oppressive and is an abuse of process of law.

10. It is submitted that the applicants cannot be connected to alleged incident, who are directors / employees of joint venture and do not have any concern with the untoward incident.

11. Learned senior advocate submits that there is no *mens rea* or *actus reus* on the part of the applicants, which is a must to attract provisions of section 304 of the Indian Penal Code. No accusations are against them in the first information report sufficient to involve them in commission of alleged offence.

12. It is further submitted that section 304 of the Indian Penal Code requires something more positive than mere negligence on the part of the persons named in the first information report.

13. Learned senior advocate refers to and relies on various citations, inter-alia, *State of Haryana and others vs. Bhajanlal and others - 1992 Supp (1) SCC 335*, contending that section 482 of the Code of Criminal Procedure has to be invoked to prevent abuse of process of court and to secure ends of justice, *Rishipal*

Singh vs. State of U.P. and another - (2014) 7 SCC 215, to contend that when a prosecution at the initial stage is asked to be quashed, the test to be applied is as to whether uncontroverted allegations as made in the complaint *prima facie* establish the case and court has to see whether continuation of the complaint would be an abuse of process of law resulting in miscarriage of justice and when the court comes to the conclusion that quashing of the proceedings would serve the ends of justice, then the court can exercise the powers under section 482 of the Code of Criminal Procedure.

14. Learned senior advocate submits, it is a settled position that it cannot be conceived that a company will instruct to its employees to violate law. The doctrine of 'vicarious liability' is unknown to the scheme of the Indian Penal Code, particularly when the offence requires *mens rea*. He refers to and relies on a decision of this court in the case of *the State of Maharashtra vs. M/s. Syndicate Transport Company Private Ltd - 1964 Mah. LJ 308*. Learned senior advocate further refers to a decision in the case of *M.V. Javali vs. Mahajan Borewell and company and others - (1997) 8 SCC 72*. He submits that the Supreme Court has often referred to

categorically to that an offence involving *mens rea* cannot be committed by a juristic person. He submits that the position in law emerges that there is no provision in the Indian Penal Code attracting vicarious liability on managing director or directors of the company. He, therefore, urges to quash and set aside the first information report registered against the applicants.

15. Learned APP appearing for the State, however, resisting the claims under the criminal application, submits, imputations are directed against the directors and personnel running the joint venture and an act on behalf of the joint venture is attributed to the applicants. Illegal excavation is alleged to be at the behest of joint venture. He submits that it is difficult to conceive that any tangible material can be made available in respect of illegal activities. However, in the present matter accusations have been made that unauthorized excavation has taken place for the work of joint venture through its personnel. As such, investigations are going on. A notice appears to have been given to the joint venture, in respect of unauthorized activities in Jalna taluka, for imposition of penalty of Rs.87,20,00,000/-. He submits that accusations against

applicants are in respect of an act done on behalf of the joint venture, causing death of a person. Large scale mining activities have been taking place unauthorizedly and it would also have to be considered that it would not be a case that such a work would not endanger life. The accusations make out a case pertaining to section 304 of the Indian Penal Code. Thus, it is a case wherein trial ought to take place and the proceeding cannot be truncated under request made in the present application. He, therefore, urges not to accept the request of quashing the proceedings and further prayed for rejection of the application.

16. The applicants have been sought to be charged of commission of offences under section 304 read with section 34 of the Indian Penal Code, along with sections 3 and 4 of the the Mines and Minerals Act.

17. Perusal of the provisions under sections 3 and 4 of the Mines and Minerals Act makes it clear that section 3 deals with definitions, whereas section 4 requires prospecting or mining operations to be under licence or lease. It is queer as to what for those are referred to in the first information report.

18. Section 304 of the Indian Penal Code deals with culpable homicide not amounting to murder. Culpable homicide is defined in section 299 of the Indian Penal Code, referring to doing of an act with the intention to cause death of a person and the illustrations thereunder show that there should be deliberation underlying the act with a view to cause death. In the present matter, it is not the case at all, nor there is any accusation in the first information report that the alleged acts attributed to the applicants have been done with a view to cause death. As submitted on behalf of the applicants, such a *mens rea* or *actus reus* is absolutely absent. It is nobody's case that, any direct act is attributable to the applicants nor their presence has been alleged on the spot at any time before the incident or even at any time while the pits were dug and / or that the thing happened under their directions. The accusation is that mines and minerals have been excavated unauthorizedly from the site for construction of the road undertaken by the applicants' joint venture. The investigations on record have not gone beyond recording the statements of the persons. The notice referred to in the investigation is not for the excavation on the spot of incident and is of a place from different taluka. The same is

being dealt with by the applicants separately. The investigation discloses there is correspondence by the authorities to the effect that the joint venture had not been authorized to cause excavation of mines and minerals. No material emerges which can attribute act of mining on the spot of the incident to the applicants. In such a situation, it is not a case where it can be said that it is a culpable homicide at the instance of the applicants. Apart from aforesaid, the first information report has been lodged almost one month after the incident, based on the information supplied by the villagers. There are only bare statements that large scale excavation has been done unauthorizedly for supplying raw material for construction of road.

19. In *Civil Application (CAO) No.1287 of 2016 in Public Interest Litigation No.56 of 2016 (Shahbaz Abrar Siddiqui vs. the State of Maharashtra and others)*, a division bench of this court in its decision dated 28th July 2016, taking stock of the legal position, has observed that, perusal of section 304-A, section 336 and 337 of the Indian Penal Code would show that to constitute an offence under said provisions, a person is required to do any rash or negligent act and even neglect to do something which a prudent

man is supposed to do, leading to the consequences as provided under said sections, may also constitute ingredients of offences under said provisions. The provisions as observed thereunder would require 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, has failed and neglected to do the same, leading to the consequences referred to in the provisions. It has further been observed that, there had been no particular averment either in the complaint or in the petition. The decision also further extracts a portion from decision of the Apex Court in the case of *Sushil Ansal vs. State through C.B.I.*, - 2014 SC 190, as under:-

" 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' 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. "*

. The division bench had further observed, it will have to be shown that the act of the accused must be proximate, immediate or efficient cause of death of victim without the intervention of any other persons' negligence. The court had also observed that there had been no allegation against the directors for an offence attributed to the company and thus the directors cannot be held vicariously liable.

. Said decision refers to the decision in *S.K. Alag vs. State of Uttar Pradesh and others - (2008) 5 SCC 662*, wherein the Apex Court has observed that, save and except some provisions specifically providing therefor, Indian Penal Code does not contemplate any vicarious liability on the part of a party who is not charged directly for commission of an offence. The division bench has also considered the decision of the Apex Court in the case of *M/s. Thermax Ltd. And others vs. K.M. Johny and others - 2011 (11) SCALE 128*, wherein it has been observed that, concept of 'vicarious liability' is unknown to criminal law and in absence of

any specific details no person can be prosecuted under the alleged complaint.

. The court has also, with reference to the decision in the case of *Arvind Navinchandra Mafatlal and others vs. Palakavayalli Joseph Thomas and others - 2010(4) ABR (NOC) 385 (Bom.)*, and *Pramod Parmeshwarlal Banka and others vs. State of Maharashtra and another - 2011 (5) AIR Bom. R. 679*, observed that, reference to said Judgments may not be necessary since they take the same view.

20. The case of *Sunil Bharti Mittal vs. Central Bureau of Investigation - (2015) 4 SCC 609* shows that, directors can be roped in only if there is sufficient incriminating evidence against them coupled with criminal intent or the statutory regime attracts the doctrine of vicarious liability. The said decision takes into account decision in the case of *Keki Hormusji Gharda vs. Mehervan Rustom Irani - (2009) 6 SCC 475*, wherein it has been observed that, Indian Penal Code, save and except in some matters does not contemplate any vicarious liability on the part of a person and commission of an offence by raising a legal fiction or by creating a vicarious liability in terms of the provisions of a statute must be expressly stated.

21. The judgment in the case of *S.K. Alagh vs. State of U.P. and others*, supra, is to the effect that that, in absence of any provision laid down under the statute, a director of a company or an employee cannot be held to be vicariously liable for any offence committed by the company itself. Albeit, in the same decision it has been observed that, whereas a person in-charge of the affairs of the company and in control thereof has been made vicariously liable for the offence committed by the company along with the company but even in a case falling under section 406 of the Indian Penal Code vicarious liability has been held to be not extendable to the directors or officers of the company.

22. In the case of *Maksud Saiyed vs. State of Gujarat and others* – (2008) 5 SCC 668, the Apex Court has observed that, vicarious liability of the managing director and director would arise provided any provision exists in that behalf in the statute and even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability. In the case of *Pramod Parmeshwarlal Banka and others vs. State of Maharashtra and*

others, supra, it has been observed to the aforesaid effect, as also decision in the case of *Arvind Navinchandra Mafatlal and others vs. Palakavayalli Joseph Thomas and others*, supra, says similar.

23. The decision in the case of *State of Gujarat vs. Haidarali Kalubhai* – (1976) 1 SCC 889 holds that, section 304-A by its own definition totally excludes the ingredient of section 299 or section 300 of the Indian Penal Code. Doing an act with the intent to kill a person or knowledge that doing of an act was likely to cause a person's death are ingredients of the offence of culpable homicide. Further, it has been observed that, the case as stated in the first information report does not make out a case of any wilful or deliberate act on the part of the accused in order to cause death of deceased nor any enmity of the accused with the deceased established. Similar are the observations of the Supreme Court in the case of *Keshub Mahindra vs. State of M.P.* - (1996) 6 SCC 129.

24. While cases, referred to above, say as aforesaid, in present matter it is not the case of the informant at all, even for the sake of argument, that excavation has been done by the applicants with an intention to cause death of a person. There is

absence of *mens rea* which would exclude application of the provision. The accusations in the first information report would not be sufficient to constitute an offence by applicants punishable under section 304 of the Indian Penal Code. The first information report, therefore, falls short of making out case against applicants for offence punishable under section 304 of the Indian Penal Code and thus is untenable.

25. There is an affidavit in reply by the informant dated 21st June 2021 stating that his statement has been recorded before judicial magistrate, first class, Badnapur and pursuant to the same it is being filed. It has been referred to in the same that son of the informant died due to accident as he slipped into the river and drowned. The informant as well as his wife have given a declaration that the first information report has been lodged under misgivings and under pressure from political leader.

26. All these gives indication that further prosecution of the proceeding under section 304 of the Indian Penal Code is unlikely to lead to its logical end and would be an exercise in futility and an abuse of process of law.

27. For the reasons afore-stated, the application succeeds. The first information report bearing No. 0338 dated 26th August 2020 lodged with police station, Badnapur in District-Jalna, against the applicants for the offences punishable under section 304 and 34 of the Indian Penal Code and sections 3 and 4 of the Mines and Minerals (Development and Regulation) Act, 1957, stands quashed and set aside.

28. Criminal Application is allowed as above and disposed of.

[NITIN B. SURYAWANSHI]
JUDGE

[SUNIL P. DESHMUKH]
JUDGE