

HIGH COURT OF ORISSA, CUTTACK

CRLMP No.1238 of 2018

(In the matter of application under Articles 226 and 227 of the Constitution of India)

SmtGeeta Devi Agarwal and others ... **Petitioners**

Versus

State of Orissa ... Opposite Party

For Petitioners : Mr. B.S. Tripathy, Advocate

**For Opposite Party : Mr.Karunakar Gaya,
Additional Standing Counsel**

PRESENT

THE HONOURABLE SHRI JUSTICE S.K. PANIGRAHI

Date of Hearing: 09.02.2022

Date of judgment:18.02.2022

S. K. Panigrahi, J.

1. These petitions under Articles-226 and 227 of The Constitution of India have been filed with a prayer to quash the criminal proceedings emanating from Case No. 2 (C) CC No. 07 of 2011, for the alleged commission of offenses under Sections-4(1), 4(1A), 21(1) and 23 of the Mines and Minerals (Development & Regulation) Act, 1957 and Under Rules 3, 6, 12(3), 12(4) and 18 of the Orissa Minerals (Prevention of theft, Smuggling and illegal mining and Regulation of Possession, Storage, Trading and Transportation) Rules, 2007, which is pending in the Court of learned J.M.F.C, Kujanga.

2. Shorn of unnecessary details, the facts of the present matter are as follows:

- i. In pursuance to the letter of The Mining Officer, Cuttack dated 02.12.2020, a truck bearing registration No. OR-05W-0779 was seized on 03.12.2010. The said truck belonged to Sri. Trupti Ranjan Das. The seizure was made on the ground of using fake transit passes for the transportation of iron ores from the stockyard at Manguli, Cuttack belonging to M/S Gananayak and Co, to M/S GNG Exports at Paradip Port.
- ii. Confiscation proceedings against the seized trucks were initiated vide C.P. Case No.69/2010, for the offence enumerated under the ambit of Sec. 23(C) of M&M(DR) Act., 1957. Another, FIR No. 5 dated-02.02.2011 was lodged on the strength of a complaint filed by DDM, Jajpur road at Paradip Marine Police Station, against Sri. Trupti Ranjan Das and M/S Gananayak and Co.
- iii. On verification of records by the State level Enforcement Squad and the Mining Squad of Mining office, Jajpur road and Mining office of Cuttack, it was found that the 125 fake transit passes out of Form-G books were used by M/S Gananayak and Co, for the illegal transportation of iron ore fines to the tune of 1842.640 MT valued at Rs.22,92,244/- (approx.). An F.I.R was lodged before the IIC, Tangi Police Station vide P.S. Case No.7/2011 against accused M/S Gananayak. & Co. and its Proprietor Sajan Kumar Joshi and

Vivek Kumar Joshi, corresponding to G.R. Case No.60/2011, pending before learned SDJM(S), Cuttack.

- iv. A complaint case, 2(c) C.C. No.7/2011 was lodged in the Learned Court of JMFC (P), Kujang by the DDM, Jajpur road against Gajanan Agrawal (Dead) along with the petitioners No.1 to 3 , making them jointly and severally liable or the acts of Sri. Trupti Ranjan Das. The petitioners are the partners in the firm of M/S GNG Exports. The learned JMFC(P), Kujanga took cognizance of the offenses against the present petitioners U/s.21(c) of MMDR Act, and under Rule-18 of OM Rules, 2007 and issued Summons. In the said complaint case, it has been prayed to confiscate the 6000 MT (approx) of iron ore fines stored at Paradip port of M/S GNG Exports.
- v. A brief background study of M/S GNG Exports reveals that, it is a registered firm based in West Bengal involved in exporting iron ore fines since 1993. From the year of 2008 they started exporting iron ore fines from the ports of Paradip, Odisha. They were granted the license for storing iron ore fines at Paradip port area vide License No. 13595. The validity of the said license was bracketed in the period between 06.12.2008 and 05.12.2010. An application for renewal was filed on 02.12.2010. However, it got rejected under Rule-6 of Orissa Mineral Rules, 2007, due to the non-production of mandatory information.

3. Learned Counsel for the petitioners Shri Bhabani Shankar Tripathy vehemently submits that the learned J.M.F.C, Kujanga, has taken cognizance of the complaint case 2(c) C.C. No.7/201 without verifying the genuineness of the allegation. The petitioner had moved this court on an earlier occasion vide WPCRL No.197/2011 for quashing the said complaint case, but the court was not inclined to interfere with the proceeding of the court below at that point in time since the investigation of the case was underway. However, the court had dismissed the petition with an observation to move the court at a subsequent stage of the proceeding. Further, the investigation is now complete and the charged sheet has already been submitted. It is clearly evinced out in the charge sheet that the transit passes were issued by M/S Gananayak and Co for the vehicle bearing Regd. No.OR-05W-0779, which belonged belonged to Sri Trupti Ranjan Das. Prima Facie evidence to bring in charges under Sections-420, 468, 471 and 34 of IPC, against the Sajjan Kumar Joshi, the proprietor of M/S Gananayak and Co. have been found. The charge sheet has been filed against Kumar Joshi, the proprietor of M/S Gananayak and Co. However, no incriminating evidence is found against the petitioners or M/S GNG Exports so as to sustain the complaint case. Furthermore, the Mining Officer, Cuttack had lodged an FIR before the IIC, Tangi Police , Cuttack in Tangi P.S. Case No.7/2011 dt.09.11.2010 corresponding to G.R. Case No.60/2011 pending before the court of learned SDJM(S), Cuttack, with specific allegations against M/s. Gananayak & Co. for

forging 121 Transit Passes which were used for transporting Iron Ore Fines. The Deputy Director Mines, Jajpur Road had deliberately and willfully suppressed the aforesaid facts and filed the aforesaid case in furtherance of the motive to harass and humiliate the petitioners by arraying them in multiple criminal proceedings. Continuing with such proceedings will be nothing but the blatant abuse of the process of law. No case against M/S GNG Exports is made out since they were bona fide purchasers of iron ores from M/S Gananayak and Co., and were under the impression that the transit passes were valid and not forged. Moreover, as the exporter M/S GNG Exporters had very little means of determining the genuineness of the transit passes.

4. Learned Counsel for petitioners also submitted that the complaint case suffers from technical laches. He placed reliance on the case of Neelu Chopra vs. Bharati¹, wherein the Hon'ble apex court held that :

“ 5.In order to lodge a proper complaint, mere mention of the sections and the language of those sections is not be all and end of the matter. What is required to be brought to the notice of the court is the particulars of the offence committed by each and every accused and the role played by each and every accused in committing of that offence.”.

Again, in the case of **Asoke Basak V. Maharashtra**², the Hon'ble Supreme court observed that, it would be difficult to hold that a complaint, even ex facie, discloses the commission of an offence by the accused in the absence of any specific averment demonstrating the role of the accused. Perusal of the make complaint would it crystal clear that the allegations made in the

¹(2009) 10 SCC 184

²(2010) 10 SCC 660

impugned complaint are absolutely vague and even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence and/or the complaint does not disclose commission of any offence by the petitioners as Partners of GNG Exports u/s.21(1) of MMDR Act, 1957 and Rule-18 of OM Rules, 2007.

Additionally, the counsel contended that mere mention of words like “ in connivance with me M/S Gananayak and Co.”, “cheated” “fraud” in the complaint, does not establish the guilt of M.S GNG Exports. Reliance was placed on the case of **Anil Mahajan V. Bhor Industries**³, wherein the Hon’ble Supreme Court has held that :

“ 8. The substance of the complaint is to be seen. Mere use of the expression "cheating" in the complaint is of no consequence. Except mention of the words "deceive" and "cheat" in the complaint filed before the Magistrate and "cheating" in the complaint filed before the police, there is no averment about the deceit, cheating or fraudulent intention of the accused at the time of entering into MOU wherefrom it can be inferred that the accused had the intention to deceive the complainant to pay.”.

5. Per contra, Ld. Senior Counsel for the State opposes the petitions on the grounds that the license granted to M/S GNG Export expired on 05.12.2011 and the iron ore fines were procured via fake transit passes. Thereby, the 6000 M.T (valued at Rs. 74,64,000) of iron ore fines stored over the granted port area to M/S GNG Export were illegal and unauthorized, and their seizure was rightful. Further, as verified by the State level Enforcement Squad along with Mining Squad of Mining Office.

³(2005) 10 SCC 228.

Jajpur Road and Mining Office, Cuttack, 125 illegal transit passes out of Form-G books bearing Numbers.030967, 031028, 031146 & 031147 were used by M/s. Gananayak & Company during the period from September, 2010 to November,2010 for the transportation of Iron ore fines in connivance with M/s. GNG Exports & its partners, to the tune of 1842.640 MT valued at Rs.22,92,244/- (approx.). Thus, M/S GNG Exports and Sri. Trupti Ranjan Das have committed offenses falling under the purview of Sections-4(1-A)of Mines and Minerals (Development & Regulation) Act, 1957 read with Rule- 12(3) and (4) of Orissa Minerals Rules, 2007. Moreover, the petitioner had earlier filed a writ petition (Crl.) No.197 of 2011, wherein the subject matter of challenge was almost same. This Hon'ble Court vide order dtd.5.8.2011 was pleased to dispose of the same holding that, the proceeding in 2(C) CC No.7 of 2011 can not be quashed in its entirety after taking all aspects into consideration. Hence, on the self same ground the present application is devoid of any merit and hence liable to be dismissed.

6. Heard Ld. Counsels for the parties and perused the materials on record.

Before advertng to the facts of the case, it is apposite to refer first to the law applicable to the facts of the present case. It is well settled that though the discretionary and supervisory powers of the High Court under Articles- 226 and 227 of The Constitution of India are very wide in amplitude, yet they are not unlimited. Nevertheless, it is trite that the powers under the said provisions have to be exercised sparingly and with

caution to secure the ends of justice and to prevent the abuse of the process of law. Where the allegations in the first information report or the complaint taken at its face value and accepted in their entirety do not constitute the offence alleged, *ex facie*, the High Court would be justified in invoking its powers under Articles- 226 and 227 to quash the criminal proceedings. Reference may be made to the Hon'ble Supreme Court's decision in ***Rupan Deol Bajaj v. Kanwar Pal Singh Gill***⁴.

7. In the case of ***State of Haryana v. Ch. Bhajan Lal***⁵, the Hon'ble Apex Court has held that an FIR can be quashed at the initial stage where the allegations made, even if taken at their face value and accepted in its entirety, do not *prima facie* constitute any offence or make out a case against the accused. The Hon'ble court observed that :

“ 105. In the exercise of the extra-ordinary power under [Article 226](#) or the inherent powers under [Section 482](#) of the Code of Criminal Procedure, the following categories of cases are given by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelized and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised:

(a) where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not *prima facie* constitute any offence or make out a case against the accused;

⁴ (1995) 6 SCC 194

⁵ AIR 1992 SC 604

(b) where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under [Section 156\(1\)](#) of the Code except under an order of a Magistrate within the purview of [Section 155\(2\)](#) of the Code;

(c) where the uncontroverted allegations made in the FIR or 'complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused;

(d) where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under [Section 155\(2\)](#) of the Code;

(e) where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;

(f) where there is an express legal bar engrafted in any of the provisions [of the Code](#) or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in [the Code](#) or the concerned Act, providing efficacious redress for the grievance of the aggrieved party;

(g) where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.”

8. The aforesaid proposition of law was again reiterated by the Hon’ble Apex Court in ***Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre***⁶, the Supreme Court has observed as follows:

⁶AIR 1988 SC 709

“7. The legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the Court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the Court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the Court cannot be utilized for any oblique purpose and where in the opinion of the Court chances of an ultimate conviction are bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the Court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage.”

9. In the case of ***M/s Pepsi Foods Ltd v. Special Judicial Magistrate***⁷, the

Hon'ble Apex court held that a Magistrate can discharge the accused at any stage of the trial if he considers the charge to be groundless, but that does not debar the accused from approaching the High Court under Section 482 of the Code or Article 227 of the Constitution to have the proceeding quashed against him when the complaint does not make out any case against him, and still he must undergo the agony of a criminal trial.

10. In the present case, the Petitioners herein have all been charged under Section-21(1) of the Mines and Minerals (Development & Regulation) Act, 1957 and Under Rule-18 of the Orissa Minerals (Prevention of theft, Smuggling and illegal mining and Regulation of Possession, Storage, Trading and Transportation) Rules, 2007. At this juncture, it would be apposite to refer to the relevant statutory provisions and examine the legal position.

11. Section-21(1) of the Mines and Minerals (Development & Regulation) Act, 1957 attaches penal liability to acts falling under the purview of Section-4(1) and section-4(1A) of MMDR Act, 1957. Sections-4(1) and 4(1A) read as follows :

(1) No person shall undertake any reconnaissance, prospecting or mining operations in any area, except under and in accordance with the terms and conditions of a reconnaissance permit or of a prospecting licence or, as the case may be, of a mining lease, granted under this Act and the rules made thereunder:

Provided that nothing in this sub-section shall affect any prospecting or mining operations undertaken in any area in accordance with terms and conditions of a prospecting licence or mining lease granted before the commencement of this Act which is in force at such commencement:

[Provided further that nothing in this sub-section shall apply to any prospecting operations undertaken by the Geological Survey of India, the Indian Bureau of Mines, 6 [the Atomic Minerals Directorate for Exploration and Research] of the Department of Atomic Energy of the Central Government, the Directorates of Mining and Geology of any State Government (by whatever name called), and the Mineral Exploration Corporation Limited., a Government company within the meaning of 7 [clause (45) of section 2 of the Companies Act, 2013 (18 of 2013), and any such entity that may be notified for this purpose by the Central Government]:]

[Provided also that nothing in this sub-section shall apply to any mining lease (whether called mining lease mining concession or by any other name) in force immediately before the commencement of this Act in the Union territory of Goa, Daman and Diu.]

(1A) No person shall transport or store or cause to be transported or stored any mineral otherwise than in accordance with the provisions of this Act and the rules made thereunder.

12. Rule-18 of the Orissa Minerals Rules,2007 reads :

“18. Penalties. - (1) Whoever undertakes or causes to undertake illegal mining, transports or stores any mineral otherwise than with the provisions of Section 4 (1) and or 4 (1A) of the Act is punishable with imprisonment for a term which may extend to two years, or with fine which may extend to twenty five thousand rupees or with both and in the case of continuance of such illegal activity with an additional fine which may extend to five hundred rupees for each day during which such illegal activity continues after conviction for the first such contravention. (2) Whoever contravenes any of the provisions of these rules shall be punishable with imprisonment for a term which may extend to one year or with fine which may extend to five thousand rupees or with both and in the case of continuation of contravention with an additional fine which may extend to five hundred rupees for each day during which such contravention continued after conviction for the first such contravention. (3) Whenever any lease-holder transports the mineral raised in his lease without a valid permit or valid transit pass or in excess of the quantity and quality permitted or mentioned in the transit pass, it shall be treated as violation of the provisions of these rules and breach of the covenants of the lease and shall be liable for penalty as provided.”

- 13.** It is alleged that the petitioners are vicariously liable for the acts of their agent namely Sri. Trupti Ranjan Das, who was involved in the transportation of the minerals by using fake transit passes.
- 14.** Learned Counsel for the petitioners argued that them being a exporter firm, did not hold the means to ensure the veracity of the transit passes. Additionally, vicarious liability is not attracted in the present case.
- 15.** The rule of criminal liability is derived from the Latin maxim *Actum non facit reum, nisi mens sit rea*, which essentially means that a forbidden act or omission has to be done with a deliberate intent to do it. Trouble arose when the question of 'how to' make a company/ corporation/ corporate entity liable for criminal offences. It is an undenying fact that a company can, in fact, partake or commit a forbidden act or omission, but the vexed question has been as to how the intent of a juristic person can be proved. Therefore, the courts developed what is termed as the 'Doctrine of Attribution'. As per this doctrine, in the event of an act or omission leading to the violation of the law, the *mens rea* i.e. the intent of committing the act would be 'attributed' to all those who were in charge of the company at the time of the commission of the offence.
- 16.** Directors, Managers, key Managerial Personnel were brought to court to account for the contraventions of law performed by them under the guise or the legal façade of the company. This doctrine is akin to what is

otherwise termed as 'lifting the corporate veil' in order to examine the ones who are the 'alter ego' of the company.

- 17.** Under the aforesaid principle of "doctrine of attribution" the effort of the courts has been to take legal proceedings against juristic entities to a just and reasonable conclusion. Merely because a corporate entity cannot be imprisoned, taking a view that persons who were in charge of the management of these companies should be left scot-free would have been an unfair and irrational approach. It is with such a backdrop that these aforesaid principles have to be understood. When there is an allegation against a juristic or corporate entity the endeavour is to ascribe or attach liability to those particular persons in charge of the affairs of the company in question, who are actually pulling the strings and running the show. It is for these reasons that the principle of 'doctrine of lifting of corporate veil' was evolved and expounded by the courts of law. Under this principle based on the materials on record, the court pinpoints or identifies the particular persons who were pulling the levers of the machinery that is a juristic entity. Having identified such persons who were actually directly involved or in charge of the affairs of the company the criminal liability is fastened or is attached to such persons and such persons only. There might be situations where a number of persons constitute the management of a corporate entity however, only by virtue of them holding a position on the management of such entity would not automatically make them liable.

18. It is due to this reason that the courts are compelled to embark upon a journey to lift the veil behind which the persons in the management of the company are crouching behind in order to camouflage or insulate themselves from any liability. Thus, having ‘lifted’ the so-called veil, liability attaches to those individuals who are identified to be the culprits hiding behind the juristic veil. This is the sum and substance of the principle of the “doctrine of attribution”. Similarly, these persons who are identified as the ‘will and mind’ are called the ‘alter ego’ of the company as they are the ones who were acting as such and had taken the company down the path of such criminality. It is thus seen that all these principles owe their origin to the principle of ‘attribution’ and it is this doctrine of attribution which is, the endeavour of fastening liability on certain individuals, within the management of the company in question while invoking either of the principles of “lifting of corporate veil” or while identifying the “alter ego” of the defaulting company.

19. As early as 1915 the House of Lords in the celebrated case of ***Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co Ltd.***⁸, while trying an offence under the Merchant Shipping Act applied the ‘doctrine of attribution’ to identify Mr. Lennard, who was the owner of the ship and also responsible for the management of the ship, as the “directing mind and will” of the company. Subsequently, in ***H.L Bolton Co. Ltd., v. T.J Graham and Sons***⁹, the Court likened companies to a human body and

⁸ [1915] A.C. 705 HL.

⁹[1957] 1 QB 159.

their brain to the directors of the company, and applied the doctrine of attribution to criminal cases. This principle though used and relied upon in India from time to time, was finally discussed extensively and applied by the Hon'ble Supreme Court in ***Iridium Indian Telecom Limited v. Motorola Inc.***¹⁰.

20. However, with courts across the country increasingly accepting the view that the Directors, Managers, Promoters etc. were the “mind and will” of the company, an unfortunate problem arose wherein all such designated personnel of the company started being prosecuted whether or not they were actually “in charge of the affairs of the company”.

21. Coming down heavily on this worrying trend, the Hon'ble Apex Court has, time and again, sternly deprecated this practice and attempted to draw a clear distinction between personnel of a company who are “actively in charge of the affairs of the company” and those who are not. Therefore, a company might not be indictable, but those particular members in charge of it are. In this regard, it would be useful to advert to the observations made by a three-Judge Bench of the Hon'ble Supreme Court in ***S.M.S. Pharmaceuticals v. Neeta Bhalla*** (supra), wherein the Hon'ble Supreme Court held that;

“5. ... a complaint must contain material to enable the Magistrate to make up his mind for issuing process. If this were not the requirement, consequences could be far-reaching. If a Magistrate had to issue process in every

¹⁰(2011) 1 SCC 74

case, the burden of work before the Magistrate as well as the harassment caused to the respondents to whom process is issued would be tremendous. Even Section 204 of the Code starts with the words 'if in the opinion of the Magistrate taking cognizance of an offence there is sufficient ground for proceeding'. The words 'sufficient ground for proceeding' again suggest that ground should be made out in the complaint for proceeding against the respondent. It is settled law that at the time of issuing of the process the Magistrate is required to see only the allegations in the complaint and where allegations in the complaint or the charge-sheet do not constitute an offence against a person, the complaint is liable to be dismissed.

...

8. The officers responsible for conducting the affairs of companies are generally referred to as directors, managers, secretaries, managing directors, etc. What is required to be considered is: Is it sufficient to simply state in a complaint that a particular person was a director of the company at the time the offence was committed and nothing more is required to be said. For this, it may be worthwhile to notice the role of a director in a company. The word 'director' is defined in Section 2(13) of the Companies Act, 1956 as under:

'2. (13) 'director' includes any person occupying the position of director, by whatever name called;'

There is a whole chapter in the Companies Act on directors, which is Chapter II. Sections 291 to 293 refer to the powers of the Board of Directors. A perusal of these provisions shows that what a Board of Directors is empowered to do in relation to a particular company depends upon the roles and functions assigned to directors as per the memorandum and articles of association of the company. There is nothing which suggests that simply by being a director in a company, one is supposed to discharge particular functions on behalf of a company. It happens that a person may be a director in a company but he may not know anything about the day-to-day functioning of the company. As a director he may be attending meetings of the Board of Directors of the company where usually they decide policy matters and guide the course of business of a company. It may be that a Board of Directors may appoint sub-committees consisting of one or two directors out of the Board of the company who may be made responsible for the day-to-day functions of the company. These are matters which form part of resolutions of the Board of Directors of a company. Nothing is oral. What

emerges from this is that the role of a director in a company is a question of fact depending on the peculiar facts in each case. There is no universal rule that a director of a company is in charge of its everyday affairs. We have discussed about the position of a director in a company in order to illustrate the point that there is no magic as such in a particular word, be it director, manager or secretary. It all depends upon the respective roles assigned to the officers in a company.”

- 22.** It would also worthwhile at this stage to extract the following observations made in **S.K. Alagh v. State of U.P.**¹¹ by the Hon’ble Supreme Court of India;

“19. As, admittedly, drafts were drawn in the name of the company, even if the appellant was its Managing Director, he cannot be said to have committed an offence under Section 406 of the Penal Code. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor. 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.”

- 23.** Furthermore, the Hon’ble Supreme Court in **Sunil Bharti Mittal v. CBI**¹² held;

“42. No doubt, a corporate entity is an artificial person which acts through its officers, Directors, Managing Director, Chairman, etc. If such a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. It would be more so, when the criminal act is that of conspiracy. However, at the same time, it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless the statute specifically provides so.

43. Thus, an individual who has perpetrated the commission of an offence on behalf of a company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Second situation in which he can be implicated is in those cases where the statutory regime itself attracts the

¹¹(2008) 5 SCC 662

¹²(2015) 4 SCC 609

doctrine of vicarious liability, by specifically incorporating such a provision.”

24. The Hon’ble Supreme Court in **Sham Sunder v. State of Haryana**¹³ observed ;

“9. But we are concerned with a criminal liability under penal provision and not a civil liability. The penal provision must be strictly construed in the first place. Secondly, there is no vicarious liability in criminal law unless the statute takes that also within its fold.”

25. In **Maksud Saiyed v. State of Gujarat**¹⁴, the Apex Court held;

“13. Where a jurisdiction is exercised on a complaint petition filed in, terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. The Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. 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.”

26. The same principle has been unambiguously reiterated in **Maharashtra State Electricity Distribution Co. Ltd. v. Datar Switchgear Ltd**¹⁵ and **GHCL Employees Stock Option Trust v. India Infoline Ltd.**¹⁶.

27. It is now well established that if the statute implicates specific liability on the constituent members of a company, then they can be arrayed for

¹³(1989) 4 SCC 630

¹⁴(2008) 5 SCC 668

¹⁵(2010) 10 SCC 479

¹⁶(2013) 4 SCC 505

contravention. Statutes mandatorily have to contain a provision to fix vicarious liability. Section-23 of the MMDR Act, 1957 affixes the concept of vicarious liability on companies. Section-23 reads :

“Offences by companies.—(1)If the person committing an offence under this Act or any rules made thereunder 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, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed with the consent or connivance of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section,— (a) “company” means any body corporate and includes a firm or other association of individuals; (b) “director” in relation to a firm means a partner in the firm.”

28. I shall now delve into the question of whether or not these offenses the Petitioners have been charged with are *prima facie* made out against them hereinunder.

29. A bare perusal of the language of Section-4 and Section-4(1A) of the MMDR Act, 1957, explicitly debars the storage and transportation of any mineral without a valid permit. M/S GNG Exports was granted the permit to store iron ore fines vide License No. 13595 of 06.12.2008 in its RS-6 plot at Paradip Port. However, the validity of the license had lapsed on

05.12.2010 and the renewal was underway but not complete. Clearly, it attracts the liability of unauthorized storage as enshrined under Section-4(1A) of MMDR Act, 1957.

30. In the case of ***Bihar MICA Exporters Association vs. State of Jharkhand and Ors***¹⁷, the Hon'ble High Court of Jharkhand has succinctly held that ;

“ In the background of the discussion made in the earlier part of this judgment, obviously this provision of Section 23-C has been introduced by the parliament in the year 1999 consciously with the object of preventing illegal mining, transportation and storage of mineral in order to suppress every serious mischief of illegal mining within the country, incidences of which have surfaced in different States and are of enormous proportions. The effect of such illegal mining is not only having an adverse effect on public exchequer by denying it valuable revenue but at the same time has the effect of degrading and denuding the environment. As such, it has also a long term effect of decline of scarce natural resources of the country such as minerals, forests reserve etc. The National Mineral Policy, 2008 also seeks to develop a sustainable frame work for optimal utilization of the country's natural mineral resources for the Industrial growth of the country and at the same time improving the life of the people living in the mining areas, which are generally located in the backward and tribal regions of the country. These resources are not to be frittered away and exhausted by any generation. Every generation owes a duty to all the succeeding generation to develop and preserve the natural resources in the country and preventing pollution, which is in the interest of the mankind. It is recognized by the Parliament and Parliament has declared that it is expedient in the public interest that the Union take under its control regulation of mines and development of minerals. Seen in the aforesaid light, the introduction of the aforesaid provision of Section 23-C with the expression "for the purposes connected therewith" is to be read in a manner to carry out the legislative intent and

¹⁷AIR 2012 JHAR 148

object. Section 23-C therefore intends to prevent illegal mining, transportation, storage of mineral in question and for the purposes connected therewith i.e. buying and selling of illegal mined minerals. It cannot be said that the persons indulging in the activity of buying or selling or trading of such minerals can escape the rigour of law while only those who are indulging in mining, transportation and storage thereof are to be subjected to the regulatory regime. Such a construction could defeat the very aim and object of the Legislature.”.

- 31.** Additionally, in the case of **Surendra Kumar Agarwal vs. State of Orissa and Ors**¹⁸, the Hon’ble Orissa High Court had expounded that :

“The 2007 Rule has been enacted by the State Government in exercise of power under Section 23C of the MMDR Act for prevention of theft, smuggling and illegal mining and to regulate the possession, storage, trading and transportation of minerals in the State of Orissa. Rule 12 of the 2007 Rules provides for seizure and confiscation of minerals raised or transported, stored, sold, supplied, distributed, delivered for sale or processed, without any lawful authority.”.

- 32.** The liability of the petitioners can be arrayed for the illegal storage of iron ore mines. With regard to the same, the Hon’ble Supreme court, in the case of **Pradeep S. Wodeyar V. The State of Karnataka**¹⁹ has held that ;

“80. Vicarious liability and Section 23 of MMDR Act A-1 submitted that the charge-sheet does not ascribe any role to A-1 and hence the process initiated against him must be quashed. The appellants in support of their argument relied on Sunil Bharati Mittal (supra), Shiva Kumar Jatia v. NCT of Delhi 60 , Sunil Sethi v. State of Andhra Pradesh 61 and Ravindranatha Bajpe v. Mangalore Special Economic Zone Ltd. 62 In Sunil Bharati Mittal (supra), a three- judge Bench of this Court observed that the general rule is that criminal intent of a group of people who undertake business can be imputed to the Company but not the other way around. Only two exceptions were

¹⁸2009 (II) OLR 407

¹⁹2021 SC 503

provided to this general rule: (i) when the individual has perpetuated the commission of offence and there is sufficient evidence on the active role of the individual; and (ii) the statute expressly incorporates the principle of vicarious liability. Justice Sikri writing for a three-judge Bench observed:

43. Thus, an individual who has perpetrated the commission of an offence on behalf of a company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Second situation in which he can be implicated in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision."

"82. Section 23(1) of the MMDR Act stipulates that where the offence has been committed by accompany, every person who at the time of the commission of the offence was in-charge of and responsible for the conduct of business shall be deemed to be guilty of the offence. The proviso stipulates that nothing contained in sub-section (1) shall render such a person liable to punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence of preventing the commission of the offence."

33. In the case of **National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal**²⁰, the Hon'ble Apex court has reiterated that;

"39 . (v) If the accused is a specific averment in the complaint and by virtue of their position they are liable to be proceeded with.€- 84. The test to determine if the Managing Director must be charged for the offence committed by the Company is to determine if the conditions in Section 23 of the MMDR Act have been fulfilled i.e., whether the individual was in-charge of and responsible for the affairs of the company during the commission of the offence. In view of the above decisions, the submissions which has been urged on behalf of the appellant cannot be acceded to. The determination of whether the conditions stipulated in Section 23 of the MMDR Act have been fulfilled is a matter of trial. Moreover, it is evident that the charge sheet, as a matter of fact, ascribes a role to A-1 and A-2 for the payment of transportation. Therefore, there is a prima facie case against A-1, which is sufficient to arraign him as an accused at this stage".

34. Additionally in the case of **Maksud Saiyed v. State of Gujarat**²¹, the Hon'ble Apex court observed that :

²⁰(2010) 3 SCC 330

²¹(2008) 5 SCC 668

“13. Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. The Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the company. The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities”.

35. Hence, adducing liability for the unauthorized storage of iron ore fines on the partners of M/S GNG Exports is well within the ambit of law and its intent.

36. It is noticed that in enactments where criminal liability sought to be affixed on a company, the provisions usually provide for “offences/contravention by companies”. That being the case when an offence is attributed to a company, the same is done on the strength of a statutory prescription, there is no question of any “vicarious liability”. Thus, the arguments that are made, time and again, before courts of law as regards to the vicariousness of liability of certain persons in the management of a company, is in essence a misnomer. It is for the simple reason that when the statute itself provides for a provision for the prosecution of a company, the only exercise that has to be done thereafter, is the application of the doctrine of attribution (supra) in order to pinpoint or fasten the liability upon the individuals within the larger body of persons occupying the management of the company.

37. Thus, the so called ‘vicarious’ liability of the Directors/ Key Managerial Personnel cannot be imputed automatically. In the absence of any statutory provision to this effect, if it is to be deemed to be included under the IPC, even then the prosecution would have to make averments with regard to the specific role played by the accused Directors/ Key Managerial Personnel and demonstrate that such person was “*in charge of the affairs of the company*” and is directly and intrinsically connected to the crime alleged. One classic example of such an express provision fastening liability on the directors of a company is Section 141 of the Negotiable Instruments Act, 1881. In ***Aneeta Hada v. Godfather Travels & Tours (P) Ltd.***²² also, the principle of “alter ego”, was applied only in one direction, as in if a body corporate was being charged with an offence, then the principle would be applied to pinpoint to the group of person(s) who guide the business who had criminal intent, and not *vice versa* so as to lead to the fallacious conclusion that all the management personnel of the company possessed criminal intent. There has to be a specific act attributed to the Director or any other person allegedly in control and management of the company, to the effect that such a person was responsible for the acts committed by or on behalf of the company. Other examples wherein a specific statutory provision has been created to fasten/affix liability on a company and the directors in charge of it are liable under some specific statutes like Section 10 of the Essential

²²(2012) 5 SCC 661

Commodities Act, 1955; Section 42 of the Foreign Exchange Management Act, 1999 and Section 17 of the Prevention of Food Adulteration Act, 1954.

38. M/S Gananayak and Co was involved in supplying iron ore fines to M.S GNG Exports. The supply was facilitated by the truck bearing registration number- OR-05-W-0779. The origination of the fake transit passes was caused by M/S Gananayak and Co. The petitioners are the partners in M/S GNG Exports. They were not involved in causing the transportation of iron ore fines . They were the receivers of iron ores and not the employer of transportation. This implicates M/S Gananayak and Co can be brought in under the purview of “transport or store or cause to be transported” as enshrined under Section-4(1A) OF MMDR Act, 1957 and not the petitioners. Accordingly, the principle of vicarious liability cannot be attached to the petitioners.

39. In light of the discussions made herein above, I am not inclined to quash the proceedings in Case No. 2 (C) CC No. 07 of 2011 in its entirety. However, this court concedes to the fact that the petitioners cannot be brought under the cloak of liability for the transportation of iron ore fines vide fake transit passes. Hence, the proceedings in Case No. 2 (C) CC No. 07 of 2011, pending before the J.M.F.C, Kujang is quashed to the extent of charges attaching liability against the unauthorized transportation of iron ore fines against the petitioners. Nevertheless, the charges for the unauthorized storage of iron ore fines are sustained.

40. At the cost of repetition, it is emphasized that nothing shall be construed to come in the way or prejudicially affect the fair trial in so far as the Petitioners in Case No.2(C) CC No. 07 of 2011 are concerned. Ordered accordingly.

41. The CRLMP is accordingly disposed of.

(S.K.Panigrahi)
Judge

Orissa High Court, Cuttack
The 18th day of February, 2022/LB

