

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL REVISION APPLICATION NO.107 OF 2023

Yunus Razzak Shaikh

Age : about 39 Years, Occu. : Welding
Workshop, Residing at : House No.539,
Yunus Complex, Sultan Lane,
at Post Mahad, Taluka Mahad,
District : Raigad.

...Applicant
(Original Accused No.6)

Versus

1. **The State of Maharashtra**
(Through Mahad City Police Station) ...Respondent No.1
2. **Suhas Sitaram Kamble**
Age : about 50 years, Occu. : Service,
Residing at : Flat No.205, 2nd Floor,
Laxmi Apartment, Kakartale, Mahad, ...Respondent No.2
Taluka : Mahad, District : Raigad. (First Informant)

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Mr.Abid Mulani i/b. Mr.Ashish P. Agarkar:-	Advocates for Applicant.
Mr.Amin Solkar – Special Public Prosecutor a/w Mr.Umang Shah:-	Advocates for Respondent-State.
Mr.A.D.Kamkhedkar:-	APP for State.

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**WITH
CRIMINAL REVISION APPLICATION NO.66 OF 2023**

Irfan Husain Miyan Qazi

Age : 43 Years, Occu. : Business,
Residing at : House No.56, Diwan
Mohalla, Bhatila Rasta, Taloja Pachnand,
Taluka : Panvel, District : Raigad, ...Applicant
Navi Mumbai : 410 208. (Original Accused No.8)

Versus

1. The State of Maharashtra

(At the instance of Mahad City
Police Station, District : Raigad
in C.R. No. 79 of 2020). ...Respondent

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Mr.Majeed Memon a/w Mr.Tapish Jain, Mr.Mateen Qureshi i/b. Mr.Kishan Chaudhari:-	Advocates for Applicant.
Mr.Amin Solkar – Special Public Prosecutor a/w Mr.Umang Shah:-	Advocates for Respondent-State.
Mr.A.D.Kamkhedkar:-	APP for State.

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**WITH
CRIMINAL REVISION APPLICATION NO.144 OF 2024**

Bahubali Tatyaso Dhamane

Age : 56 Years, Occu. : Nil,
Residing at : A-1 Building, 1001,
Keshav Heights, 90ft Road,
Parasik Nagar, Kalwa, Thane (W), ...Applicant
Pin : 400 605. (Original Accused No.3)

Versus

1. **The State of Maharashtra**
(Through Mahad City Police
Station in C.R. No. 79 of 2020). ...Respondent

Mr.S.M.M.Owais T. Jahagirdar a/w Mr.Sultan Khan:-	Advocates for Applicant.
Mr.Amin Solkar – Special Public Prosecutor a/w Mr.Umang Shah:-	Advocates for Respondent-State.
Mr.A.D.Kamkhedkar:-	APP for State.

CORAM : S. M. MODAK, J.

RESERVED ON : 6th MAY 2024

PRONOUNCED ON : 13th JUNE 2024

P. C. :

1. These Revisions are filed by Accused on the premise that there is no ‘*contractual relationship*’ or there is no ‘*professional commitment*’ supported by documents which is the foundation for prosecuting them and if it is so, they cannot be charged. They have been **charge sheeted by Mahad Police Station** for being responsible for **causing the death of 16 persons and causing injuries to various persons**

and **it is due to collapse of multi-storey building**. There is an allegation that there was total careless approach in taking precaution and it was of such a magnitude that the building could not last long and collapsed within 6 years of its construction.

2. As everyone knows, developing the property involves various steps to be undertaken right from selecting the site, preparing building plans, getting approvals from Local Authority, doing construction as per the sanctioned plan and using standard building material and so on. So also, in any such construction activity, there are various persons involved right from the owner of the land, the person undertaken the responsibility described as a developer (who may not be having technical knowledge of carrying out construction but he is the person who can raise financial and human resources), the persons who actually do the construction, the persons from whom raw materials are purchased and labourers.

3. In this case, the prosecution claims that at every stage of construction activity, there was deliberate go-by to the standard requirements of construction activity by all the stakeholders and that is why, the building collapsed within 6 years of construction and that too,

without any external force and the building collapsed just like the play cards used by the children causing casualties to 16 persons.

4. It is true that the legislators have included not only **an act** within the meaning of the term as an '*offence*' but also an '*illegal omission*'. The prosecution case rests on certain positive acts done by the relevant Accused persons and also on illegal omission of not taking proper care. These three Applicants are the three Accused apart from other Accused charge sheeted by the Mahad Police, District : Raigad. The offences are under Sections 304, 420, 465, 467, 468, 120-B, 471, 201, 337, 338 read with 34 of the Indian Penal Code, 1860 (hereinafter, "the IPC").

5. According to two **Applicants**, the materials collected during investigation fall short to show '*contractual responsibility like developer*', forget about the satisfactory material to frame charge for any of the offence and they have been charge sheeted just because they are the relatives of either owner of the land and the developer. The **Applicant Bahubali Dhamane** claims that even though he is an engineer by profession, there is no single document to show his '*professional commitment*' with the project undertaken by the

developer Farooque Qazi. On this premise, all the 3 Applicants have filed three separate Applications for discharge.

6. The Court of **Additional Sessions Judge, Mangaon** rejected their Applications by **two separate orders** dated **15th February 2023** and **2nd September 2023**. There is one procedural grievance about non-compliance of the provisions of Section 226 of the Code of Criminal Procedure, 1873 (hereinafter, “the Cr.P.C.”) ‘about opening up the case by the prosecution’. The prosecution has not opened up their case and the trial Court is set to frame a charge. It was not upheld by the trial Court. That is why these three separate Revision Applications.

7. On this background, I have heard learned Advocates Shri.Mulani and Shri.Agarkar for the **Applicant – Yunus Shaikh** in Revision Application No.107 of 2023, learned Advocate Shri.Majeed Memon for the **Applicant – Irfan Qazi** in Revision Application No.66 of 2023 and learned Advocate Shri.Jahagirdar for the **Applicant – Bahubali Dhamane** in Revision Application No.144 of 2024. Also heard learned Special Public Prosecutor Shri.Solkar for **Respondent – State** in all these matters. Though charge-sheet consists of thousand of

pages, the Applicants have annexed papers from the charge-sheet which according to them, are relevant for deciding their individual grievances. So also, Mr.Solkar filed relevant papers, predominantly statements of the witnesses recorded during investigation and particularly which connects these three individual Applicants. That is how, this Court has to decide these Revisions. For deciding the points raised, the facts need to be considered.

Facts as per prosecution

8. The building known as '*Tariq Garden*' situated at Mauje Kaljapura, Taluka : Mahad, District : Raigad collapsed on **24th August 2020 at 6.15 p.m.** The occupants of the building were caught and those who did not get an opportunity to save their lives, either died or got injured. Such number of death is 16 and several injured. The local Police and Officers of Mahad Municipal Council reached the spot. After appraisal of the situation, **Shri.Suhas Sitaram Kamble being Junior Engineer of the Council lodged a complaint** with Mahad Police Station against five persons. It is registered as an offence under Sections 304, 304-A, 337, 338 read with 34 of the IPC. On completion of investigation, charge-sheet was filed for the offences

mentioned above. There were two charge-sheets. The **Applicant - Yunus Shaikh** and **Applicant - Bahubali Dhamane** are named in the first charge-sheet. Whereas, **Applicant Irfan Qazi** is named in the supplementary charge-sheet.

9. The allegations from the charge-sheet can be summarized.

Firstly the names and their role as per prosecution case is as follows :—

<u>Sr.No.</u>	<u>Name of the person</u>	<u>Role played / Status</u>
(i)	Abdul Razzak Shaikh	An owner of the land
(ii)	Farooque Mahmood Miya Quzi	Developer of the land (Accused No.1)
(iii)	Shivpal Mangal Yadav	Contractor
(iv)	Gaurav Jinendrakumar Shah	An Architect (Accused No.2)
(v)	Applicant : Bhaubali Dhamane	R.C.C. Consultant (Accused No.3)
(vi)	Vivek Keshavrao Dongare	An Architect (Accused No.7)
(vii)	Asrar Habib Pathan	Described as a Supervisor by the witnesses
(viii)	Applicant : Yunus Razzak Shaikh	Original Accused No.6 (son of the owner Abdul)
(ix)	Applicant – Irfan Qazi Farooque)	Accused No.8 in supplementary charge-

		sheet. (cousin brother of developer
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There are also other Accused. But they are not before this Court.

10. **Now, the other details about the documentation / plans** are as follows:-

<u>Sr.No.</u>	<u>Nature of the document / Facts</u>
(i)	There was Memorandum of Understanding dated 28 th January 2011 executed in between the owner Abdul Razzak Qadar Shaikh and the developer M/s. Kohinoor Developers (Prop. Shri.Farooque Mahmood Miya Qazi / Accused No.1.
(ii)	Development Agreement and Power of Attorney dated 7 th March 2011
(iii)	Supplementary Agreement dated 30 th November 2011 <i>One of the allegations against <u>Accused No.6 Yunus Shaikh</u>, who is son of the owner Abdul Razzak Shaikh, is <u>signing these agreements as a witness</u>.</i>
(iv)	The development is by way of constructing a multi-storey building on the site. The consideration was decided and it was money consideration and kind consideration by way of sharing the prospective construction. (65% to the Developer and 35% to the

	Owner).
(v)	Vivek Dongare – Accused No.7 was appointed as an Architect. He runs a business in the name and style as Vastupurti Architect , Interior Designer and Consultancy Services.
(vi)	There are two more professionals. One is Accused No.2 – Gaurav Shah as an Architect and Bahubali Dhamane - Accused No.3 as an RCC Consultant . <i>All the above professionals have worked in tandem in other projects and also in tandem with Developer Farooque Qazi in other projects undertaken at Navi Mumbai – CIDCO.</i>
(vii)	The Application was submitted for building construction on 5th April 2011 . Building permission was granted by Mahad Municipal Council on 11th May 2011 . <i>(Its copy is tendered by learned Advocate Shri.Memon). In condition No.27, there is a description of total floors to be constructed. It consists of stilt and fourth floor above the stilt. This was produced in order to rebut the contention of Mr.Solkar that unauthorised construction of fifth floor was constructed even though building permission was only up to forth floor).</i>
(viii)	<u>Sanjay Govind Shinde</u> was Chief Executive Officer

	and <u>Devendra Madhukarrao Morkhandikar</u> was City Engineer at the time of granting of building permission. <u>They are the witnesses.</u>
(ix)	Occupancy certificate was granted by Mahad Municipal Council. At that time, <u>Deepak Jinjhad</u> was the Chief Executive Officer and <u>Shashikant Dighe</u> was the City Engineer. They were shown as Accused. Yet, sanction is awaited. Their statements are recorded. The file pertaining to building permission and occupancy certificate went missing and according to Mr.Solkar, it is immediately after the collapse of building and the Investigating Agency with all its best efforts could not collect those documents.
(x)	There is a contractor appointed by the Developer – Farooque Qazi. He is one <u>Shivpal Yadav</u> . He is the witness.
(xi)	There is a reference of appointment of the supervisors by Developer Farooque Qazi in statements of some of the witnesses. Their names are as follows:- - Aasarar Pathan Irfan Qazi (Accused No.8)
(xii)	Accused No.8 <u>Irfan Qazi</u> / one of the Applicants

	(who is cousin brother of the Developer), he was neither named in the FIR nor in the first charge-sheet. He was charge-sheeted by way of supplementary charge-sheet and there is much emphasis by learned Advocate Shri.Memon on this lackadaisical approach of the Police. Following are the relevant witnesses:- (a) <u>Asarar Habib Pathan</u>, another supervisor, statement dated 11th May 2021 and statement under Section 164 of the Code on 13th May 2021. (b) Statement of <u>Shivpal Yadav</u> dated 21st September 2020. (c) Statement of one <u>Ramchandra Vitthal Marathe</u> dated 7th September 2020 who worked as an engineer in the Office of Shravani Consultant run by Applicant – Bahubali. He has explained the pattern of work of RCC Consultant about visiting the site, about testing the details of pits, steel etc., issuance of stability certificate.
(xiii)	The building was occupied by the purchasers. It consists of residential and commercial units. There are statements pointing out collection of maintenance by <u>Accused No.6 – Yunus Shaikh</u>

	when the Society was not formed.
(xiv)	Building collapsed on 24th August 2020 at about 6.15 p.m., and FIR is lodged by City Engineer Suhas Kamble on 25th August 2020 with Mahad Police Station. The offences under Sections 304, 304-A, 337, 338 read with 34 of the IPC was registered against in all 5 persons.

11. Before considering the submissions made by respective Counsels for individual Applicants, it will be relevant to quote the materials placed against them individually. There are allegations involving all and there are specific materials referred against them. They are as follows :—

Materials against the Applicant – Yunus Shaikh and Irfan

12. Some of the witnesses have referred about **Applicant Yunus** and some of them have referred about **Applicant Irfan**. Whereas, there are few witnesses who have referred about both of them. That is why, the materials referred by the Prosecution are reproduced together. They are as follows:-

(i) There are statements of purchasers. One of them is

Mannan Shakil Karbelkar dated 26th August 2020. The facts stated by her in nutshell are as follows:-

- (a) Present **Applicant Yunus** introduced the witness with developer Farooqui Qazi. He has agreed to purchase Room No.503 on fifth floor.
- (b) **Applicant – Yunus** also issued the payment receipt for token amount. Even, he accepted Rs.5,00,000/- (Rupees Five Lakh Only) and receipt from the Developer Qazi was arranged.
- (c) The witness and his mother used to visit the site. He noticed use of gypsum material. **Applicant Irfan Qazi** was asked about the same and he explained *“this is new technology and this was also used in Mumbai and heat is not generated and in fact coolness is maintained”*.
- (d) Remaining payment was accepted by the **Applicant Yunus** and developer.
- (e) The sale-deed was executed in between mother Shahida and **Applicant Yunus** and developer Farooque in the year 2013. She claims that both the Applicant Yunus and

developer Farooque were partners. The possession of the room was handed over in December-2013 and occupancy was started in January-2014.

- (f) The building consisting of two wings. Every wing is having 20 rooms. The **Applicant Yunus** is having office, gym, madarasa in the parking area, so also, there was office of a builder in the said parking area.
- (g) The occupants requested the **Applicant Yunus** and builder to form a society. The Applicant Yunus used to collect rupees 1 per square foot per month. It comes to Rs.705/- per month. Even **Applicant Yunus** collected Rs.5000/- for formation of the society but he has not fulfilled the promises.
- (h) The plaster has fallen down and it was informed to the **Applicant Yunus**, however, he has not paid heed.
- (i) Water was percolating from the walls and it was informed to the builder Farooque and his brother **Applicant Irfan**, however, both have not paid heed.
- (j) Even electric wiring was burnt and **Applicant Yunus** and

Applicant Irfan has collected the amount for new wiring.

- (k) On 14th August 2020 at about 6.10 p.m., he sensed that the building is shaking. He noticed gathering of persons at the ground floor and they were shouting for escaping from the building. When he came out, the building collapsed within fraction of seconds and that is how he survived.
- (ii) There are statements on similar lines of the witnesses **Hashim Abdulla Shaikhnag**, **Fauziya Hidayat Mukadam** and **Tabbasum Khalil Ahmed Ansari** (daughter of Abdul Razzak Shaikh / **sister of Applicant Yunus**). They have disclosed more or less same facts. For avoiding repetition, statement of **Tabbasum** is considered. She has stated following facts:-
 - (a) She knows about sale of rooms by her father and brother **Applicant – Yunus** and some rooms were rented.
 - (b) She is having knowledge about maintenance of the building by her brother Applicant – Yunus.
 - (c) She is aware about use of the premises on ground floor of

A wing by her brother **Applicant Yunus** for office purpose.

- (d) She is aware about burning of electric wiring of the entire building and it was replaced by her brother Applicant Yunus and developer Farooque.
- (e) She is aware about carrying out repairs including plaster by her brother Yunus from the amount collected towards maintenance.
- (f) Her close relatives expired during the incident that took place on 24th August 2020 at about 6.15 p.m. Their names are:-
 - (i) Her sister-in-law Fatima,
 - (ii) maternal nephew Altamash and
 - (iii) mother-in-law Kamrunissa.

Somehow she could survive as she came out of the building in time. (There is emphasis by the learned Advocate that how owner will allow their close family members to reside in the building having inferior construction).

(iii) There are statements of owners of brick kiln who have supplied bricks to the project. They are **Govind Ganpat Rakshe** and **Ranjit Ramesh Natekar**. The facts stated by them are as follows:-

(a) They have sold approximately 80 thousand to 90 thousand bricks and seven thousand to eight thousand bricks (by his brother Vishwajeet) respectively for the project undertaken at village Kajalpura by the **Applicant Yunus**.

(iv) There is a statement of centering contractor **Shivpal Yadav** dated 12.09.2020. He has stated following facts:-

(a) Earlier he has worked with developer Farooque in other projects. He has stated about visit by the **Applicant Yunus** to the present construction site.

(b) The witness has said about appointment of Aasrar Pathan as supervisor by the developer for supervising the construction. So also **Applicant Irfan** used to supervise the building construction. According to learned Advocate, how there can be different supervisors. Even

Applicant Irfan was also supervising the construction.

- (c) The contractor on the say of builder Farooque and **Applicant Yunus** have used the concrete consisting of sand, grit powder stone.
- (d) The **Applicant Yunus** was not using sufficient water which is required once the slab is erected.
- (e) The **Applicant Yunus** used to arrange for bricks, sand, stones and other materials.
- (v) There is a statement of **Amanoor Ansar Ali** dated 22nd September 2020. He does the brick work and plaster work in construction. He has stated following facts:-
 - (a) About the presence of the **Applicant Yunus** at the site and also complained about inferior sand. Even he has complained about inferior material used for plastering the walls of staircase and lift.
 - (b) He has done plastering in the bathroom, one side of the kitchen, staircase and lift whereas, at other places, gypsum was applied on brick work. (he wants to suggest there was no plastering).

- (c) The **Applicant Yunus** used to visit the site whereas, the developer Farooque used to visit occasionally. He was paid by the builder Farooque and occasionally by the **Applicant Yunus**.
- (vi) There is a statement of one **Vakil Maqbul Khan** dated 23rd September 2020 who is POP contractor. He has stated following facts:-
 - (a) The deal was finalised with developer Farooque, the outside plastering work has started. There was no plastering from inside. The developer Farooque insisted on the witness to start with the POP work even though there was no inside plastering. According to the builder, it was practice followed at Mumbai. The **Applicant Yunus** also used to visit the site and used to give instructions. He was not paid his charges.
- (vii) There are two statements of supervisor **Aasrar Habib Pathan** dated 11th May 2021 recorded by the Police on the basis of questions put through mobile and secondly, recorded by the Magistrate dated 13.05.2021 through

video conferencing. He has not signed on that statement because he has left India. He has stated following facts:-

- (a) He states about supervision by the **Applicant Yunus**. He states about visit by one engineer in Wagon R car and then holding of meeting involving developer Farooque Qazi, **Applicant Irfan Qazi**. The witness was not allowed to participate in the meeting.
- (b) The witness has never seen the Municipal Officers visiting the site. He also used to put water on the sand. He noticed some soil coming from that sand. They have used the drainage water even after water connection was taken from the Council.
- (viii) There is a statement of witness **Tanzeem Mustafa Chaphekar** dated 5th July 2021. Her in-laws have purchased flat No.301. She has stated following facts:-
 - (a) She has noticed visit of Developer Farooque and **Applicant Yunus**. After she had gone for residence, she heard about poor quality of construction and she has complained about electricity buttons and she was told by

Applicant Irfan “*about voltage problem in Mahad and similar buttons are also fitted at Taloja*”.

- (b) When the witness has complained about burning of electric wiring in the flat of Harshim Shekhnag, **Applicant Irfan** gave explanation about voltage problem.
- (c) Developer Farooque and **Applicant Irfan** used to say “*this is the first multi-storied building at Mahad and all facilities are provided and why you are complaining about minor issues.*”

Allegations and materials against Applicant - Bahubali Dhamane

- (i) There is a statement of witness **Ramchandra Vitthal Marathe** recorded on 7th September 2020. He was bachelor of engineering on civil side. He was working in the office of **Applicant Bahubali**. He has stated following facts:-
 - (a) Accused No.7 Vivek Dongare - Vertical Architecture has assigned the work of preparing RCC design to **Applicant Bahubali**. It was relating to construction of four storey

building at Mahad.

- (b) In the year 2010-2011, he has visited the construction site on the instructions of his employer Mr.Bahubali and he has inspected the construction work including the pits and its depth as per the building plan given by the developer Farooque. He noticed that the width and depth of the pits were not as per the measurement. But, they are of less dimension.
- (c) The construction cost of the plinth work will be more if done as per the measurement and that is why, he was instructed by the Developer Farooque Qazi to reduce the measurement of the pits.
- (d) The witness **Marathe** asked the Developer to have interaction with **Bahubali**.
- (e) There was a difference of opinion in between the witness and developer. There was discussion in between the Applicant **Bahubali** and builder Farooque Qazi in the cabin.
- (f) Thereafter, the witness has never visited the site and he

felt that even his employer has not done further work.

(According to the Prosecution, this statement indicates that the Applicant Bahubali worked as an RCC consultant. Whereas, according to his Advocate, this statement nowhere suggests that the Applicant Bahubali has prepared the RCC plan).

- (ii) The statement of **Shivpal Yadav** – contractor recognises the **Applicant Bahubali**. He worked as a centering contractor at Mahad site. Even he has signed on agreement which was in English. He cannot read English. The pits were digged on the say of Architect Vivek Dongare and the Developer Accused Farooque and Applicant Yunus Shaikh were present.
- (iii) The Architect Vivek Dongare has not given the RCC plan. *According to the Applicant, this statement nowhere suggests that the Applicant worked as an RCC consultant for the project in question.*
- (iv) *The certificate of stability issued by the Applicant in the name of Shravani Consultant dated 7th April 2017 for the*

project in question. According to the Applicant, he has never issued it. It does not bear his signature. Whereas, according to Mr.Solkar, the Applicant used to sign differently at various places and the documents were issued in other projects are also collected. However, stamp of Shravani Consultant is the same on all these documents. He also submitted that the samples of signatures of the Applicant were also taken and sent to Forensic Expert.

(v) According to him he was interrogated for the purpose of seizing the RCC plan prepared by him. The concerned remand reports were shown to me by Mr.Solkar. According to him, he has not cooperated by producing the RCC plans.

(vi) According to learned Advocate for the **Applicant – Bahubali**, the handwriting expert opinion is not favouring the Prosecution and in fact, he could not come to the conclusion that signature on disputed stability certificate belongs to his client and as such, this material does not

help the Prosecution to show involvement of the Applicant.

- (vii) According to him, no agreement is seized showing the relationship in between the Developer Farooque and his client as an RCC Consultant and even, no documents are seized from the Municipal Council record to suggest that he has tendered his licence / certificate along with the building proposal.

13. On this background, it will be relevant to consider the submissions made by the respective Counsels.

Submissions made on behalf of the Applicant – Yunus Shaikh

14. Learned Advocate Shri.Mulani made following submissions:-

- (a) Even though he is a son of the owner Abdul, merely on that basis he cannot be prosecuted but there has to be concrete materials to show that Applicant was involved in the decision making process, that is to say, selection of materials, supervision and all other related activities.

- (b) Unfortunately, there is no material on such line and the material alleged against the Accused is not sufficient to pinpoint the involvement of the Applicant in the offence.
- (c) Even though witnesses have said about Applicant acting as a supervisor, there is no document issued either by his father or by the developer Farooque in favour of his client.
- (d) There are no documents to suggest that the Applicant has received any monetary consideration from the developer or from anyone for the services alleged to be rendered by him or for any other purpose.
- (e) Merely because the Applicant is having office on the ground floor of the building, it does not takes the Prosecution case further.
- (f) If the Applicant is a party to so called theory of defective materials, why he could have asked his sister to stay in the said building. This conduct in fact justifies his innocence.
- (g) The fact that the Applicant's sister and four other relatives have expired in that mishap itself suggests that the Applicant has taken the risk of allowing them to stay in the building.

- (h) Whatever amount of maintenance is received by the Applicant was utilised towards salary of guards, employees, water bills etc.
- (i) Whatever documents signed by Applicant were signed not as an executant but as a witness. Signing the document as witness does not make the signatory liable for consequences arising out of the said agreement.
- (j) The Developer has appointed all the necessary persons for carrying out the construction which includes the contractor Shivpal Yadav and supervisor by name Aasrar Pathan, hence, the theory of Prosecution of labelling him as a supervisor is unrealistic. In fact, there is the imagination of the witnesses and it cannot take place of actionable material against him.

15. Mr.Abid Mulani relied upon the following judgments:-

- (a) *Baldev Raj Kapur v/s. State*¹
- (b) *Nitinchandra Somnath Raval v/s. State of Gujarat and Others*²
- (c) *Vikrant Rajkumar Gupta v/s. State of Maharashtra, through Police Station Officer, Police Station*

1 2009 (108) DRJ 520

2 (2019) 14 Supreme Court Cases 676

*Ramdaspath, Tahsil and District Akola*³

(d) *Akshay Manoj Jaisinghani v/s. State of Maharashtra*⁴

(e) *Benny v/s. State of Kerala*⁵

Submissions made on behalf of the Applicant – Bahubali

- (a) Even though the Applicant has worked as a consultant for other projects undertaken by developer Farooque and also in joint venture with Vastupurti Architect, there is no single document to show the appointment of the Applicant as an RCC Consultant for this project.
- (b) During thorough investigation by the Police, they have not collected any document from any source to show that the Applicant has worked as a consultant for this project.
- (c) There is no agreement executed in between the owner / developer / architect with the Applicant as RCC Consultant.
- (d) There are statements recorded of **Sanjay Govind Shinde** and **Devendra Madhukarrao Morkhandikar** being the employees of Mahad Municipal Council and they were involved in the process

3 2015 SCC OnLine Bom 3006

4 2017 SCC OnLine Bom 9808

5 1991 Cri LJ 2411

of issuing building permission. They have not referred about involvement of this Applicant in the entire process.

- (e) Even though there is a statement recorded of his employee **Ramchandra Vitthal Marathe**, whatever the facts are stated by him were general in nature and he has nowhere stated about preparing RCC design by this Applicant.
- (h) In fact, his statement suggest difference of opinion with developer and discontinuance of the visit by his client to the said project.
- (i) Prosecution claims that the Applicant has issued stability certificate for this project, however, it was neither issued nor signed by him.
- (j) The investigation agency have also collected the handwriting samples of his client and it was sent to the state handwriting expert for comparison. However, there is no report given by the expert favourable to the Prosecution.
- (k) About the allegations of different stamps and letterheads used by the Applicant, his contention is, they were not sent to handwriting expert.

- (l) Even contractor **Shivpal Yadav** has done some centering work, he has nowhere said about involvement of his client.
- (m) The statement recorded of **Santosh Jayram Girkar** by the Magistrate suggest about introducing Vivek Dongare with Gaurav Shah. It refers to telephonic conversation after collapse of the building. Vivek Dongare has admitted about signing on behalf of Gaurav Shah and he has made a request to witness **Girkar** to request Gaurav Shah to authorise Vivek Dongare to sign on his behalf. According to the Applicant, this indicates who has signed on the forged stability certificate and necessarily not this Applicant.
- (n) The employees of Mahad Municipal Council were involved in the entire building project as a part of their duty. The relevant documents were not submitted along with the charge-sheet. They were yet not charge sheeted for want of sanction.

Submissions made on behalf of the Applicant – Irfan

16. Learned Advocate Shri.Majeed Memon made following submissions:-

- (a) The **Applicant Irfan** is not named in the FIR.
- (b) Even when the Police have filed the first charge-sheet, the Applicant is not charge-sheeted and he is not shown even as an absconding Accused. It indicates non involvement of the Applicant and false implication by creating false record.
- (c) There is a statement of one **Mannan Shakil Karbelkar** recorded on 26.08.2020. He is one of the purchasers of the flat in the building in question. His mother Shahida and brother Mujammil used to visit the site at the time of construction and they have questioned about use of gypsum and at that time, present Applicant replied “*this is a new technology and it is being used in Mumbai and less heat is generated and coolness is maintained*”. According to Mr.Memon, if this is the statement available at the time of filing of charge-sheet, still Police have not charge sheeted his client at the beginning.
- (d) Even there are few other witnesses who have named the present Applicant and their statements are part of the first charge-sheet. Their names are as follows:-

- (i) Abdul Razzak Shaikh

(ii) Tabassum Ansari

(iii) Shivpal Yadav

(iv) Aasrar Pathan

Still, the Investigating Agency has chosen not to charge sheet the present Applicant. It was for the reason that they were satisfied about insufficiency of materials against this Applicant.

(e) Even after the arrest of **Irfan** on 27th June 2021, there is statement recorded of **Tanzeem Mustafa Chaphekar** on 5th July 2021.

(f) Even if the allegations in these statements are considered, at their face value, it cannot be said that Applicant can be blamed for the mishap.

(g) Mr.Memon invited my attention to the observations in Para No.23 while granting bail to the **Applicant Irfan Qazi**. Learned Single Judge observed, there is no evidence on record to indicate the appointment of **Irfan Qazi** as a supervisor by Farooque Qazi. He had no power of decision making. The evidence on record does not indicate that he had participated in the construction activity or was an instrumental in using inferior quality material

for construction of the said building. He was not named as an Accused in the FIR. He was subsequently arrested.

- (h) After construction, the building lasted for 7 years, hence, it cannot be said that the construction was defective.
- (i) Statement of **supervisor Aasrar Pathan** is recorded. He is not joined as an Accused person. This is a partisan approach by the Police.
- (j) The present Applicant is not shown on the pay-roll of Accused No.1 – Farooque being the developer.

17. Learned Advocate Shri.Majeed Memon relied upon the following judgments:-

- (a) The observations by learned Single Judge of this Court while dealing with the Bail Applications on 3rd January 2023.
- (b) The observations in the order dated 22nd September 2022 in Criminal Revision Application No.340 of 2016 between *Prakash Digambar Lanjekar v/s. The State of Maharashtra*.
- (c) *Ashok Muktaji Pawale v/s. The State of Maharashtra and Ors.*⁶

6 Criminal Writ Petition No.1494 of 2017 : 9th January 2018 : Bombay High Court

- (d) *Shantibhai J. Vaghela and Anr. v/s. State of Gujarat and Ors.*⁷
- (e) *Abdul Salim Shaikh (Siddique) and Anr. v/s. The State of Maharashtra*⁸
- (f) *Keshub Mahindra v/s. State of M.P.*,⁹
- (g) *P. Vijayan v/s. State of Kerala & Anr.*¹⁰

18. Learned Special Public Prosecutor Shri.Solkar made following submissions:-

- (a) According to him, the trial Court has rightly rejected all discharge Applications. The impugned orders are reasoned orders and no interference is warranted.
- (b) According to him, there is ample material against the three of the Applicants to frame a charge and their Applications need to be dismissed.
- (c) The nature of enquiry at the time of framing of charge is different from the nature of enquiry required to be conducted at

(Aurangabad Bench)

7 2012 AIR SCW 6349

8 Criminal Bail Application No.850 of 2014 : 28th October, 2014 : Bombay High Court

9 1996 (6) SCR 129

10 AIR 2010 Supreme Court 663

the time of final appreciation. When these materials are perused from that perspective, framing of charge is justified.

- (d) Detailed dissection of the material is not warranted. It can be done only at the time of final appreciation.
- (e) To the objection about non compliance of the provisions of Section 226 of the Code of Criminal Procedure, he invited my attention to the following observations of the trial Court:-

“The Draft Charge needs some modification, but by submitting such Draft Charge and by making oral submissions, Ld. Special P.P. Shri.Amin Solkar succeeded in proving that evidence collected by the prosecution, is sufficient to frame the charge against accused persons and to proceed with the trial.”

- (f) According to him, these observations succinctly describes how those provisions are followed.
- (g) If the allegations in the statements of the witnesses are considered, it shows, how the **Applicant Yunus** and **Irfan** are involved in the construction activity and how they have participated in different acts including interacting with prospective purchasers, signing as a witness, giving instructions

to the contractor, collecting the amounts from the prospective purchasers, giving evasive answers when queries are raised by prospective purchasers about inferior quality of material.

- (h) It is not required that there should be some document to show the involvement of the Applicants. Even the participation in the construction activity is sufficient to prosecute them because knowingly they have participated in those activities and particularly knowing about consequences of use of defective materials. It is due to their intimate relations with the owner of the land and developer. **Applicant Yunus** is the son of the owner whereas, **Applicant Irfan** is cousin brother of developer.
- (i) He strongly placed reliance on the report given by Veermata Jijabai Technological Institute, Mumbai (hereinafter, “the VJTI”) dated 17th May 2021. The said report was given after perusing the drawings, after preparing structural model of the building by way of software, by taking the samples of RCC from the site and examining them and also by visiting the site.
- (j) According to him, when the findings given by the expert is considered along with the allegations of inferior materials, it

leads to inevitable conclusion that the Applicants are responsible for the mishap.

Consideration

19. Firstly about grievance of non compliance of the provisions of Section 226 of the Code. The grievance raised is the prosecutor in charge is supposed to open up the prosecution case and it has not happened. Learned advocate Shri.Mulani has emphasized on this lapse. It is true that certain stages are prescribed in the Code before the actual trial proceeds. They are as follows :--

- (a) opening up the case by the prosecution. It assists the Court in knowing the case of the prosecution.
- (b) on that basis, if accused wants, he may file discharge Application.
- (c) the Court is supposed to decide the discharge Application and
- (d) if the discharge application is rejected, then the Court is supposed to frame charge.

If we consider all the stages, one may understand the importance of opening the case of the prosecution. We may find such stage is not

provided in trial of other type of cases as per the Code. The reason is as compared to other cases, the session case involves serious offences. However, I find no merit in this grievance. Because, when I have read the findings pointed out by Mr.Solkar from Para No.22 as reproduced above, I find that the prosecution has submitted draft charge and the trial Court has also opined that it needs some modification. It indicates that the prosecution has fulfilled their responsibility.

20. Other points raised in these Revisions need to be decided from two perspectives:-

- (a) The scope of enquiry while hearing discharge Application and
- (b) Whether the materials pointed out against the individual Applicants are sufficient to frame a charge against them.

The first issue about the scope of enquiry is no more *res integra*. It is well settled. The prayer for discharge needs to be considered on the basis of the materials collected during investigation. Those materials need to be believed as true. The Court is not expected to conduct a detail enquiry by ascertaining whether there is corroboration. The Court is not expected to inquire whether the facts stated by the

witnesses are true or not true. His *bonafides* cannot be tested. It is also true that by considering the materials vis-a-vis the ingredients of the offences to be charged, the Court has to see whether those ingredients are satisfied at a *prima facie* stage.

21. This limited enquiry is expected because there is no scope for cross-examination. The Accused can plead for discharge only by contending that if these materials considered together, do not warrant framing of charge. The Accused is not expected to challenge the veracity, source of information of the witnesses and so on. In nutshell, these materials need to be considered as *prima facie* true.

22. There are certain judgments relied upon by both the sides on the point of scope of enquiry to be conducted at the time of framing of charge. It is true that in some of the judgments, the observations about “*fulfilling the ingredients of the offence*” are made while hearing the bail applications. One of such judgments is relied upon by Mr.Memon in case of ***Abdul Salim Shaikh*** (supra). That was also a case involving death of 72 persons and causing injury to 62 persons due to collapse of a building. Learned Single Judge observed that offence under Section 304 of IPC is not disclosed but what is

disclosed is an offence under Section 304-A of IPC.

23. It is true that in some of the matters involving the Special Act, the Court while deciding the bail applications is expected to make some *prima facie* observations about the guilt of the Accused. For example, the offences involving the NDPS Act and offences involving the MCOC Act. Unless and until, those observations are made, the Court cannot decide the bail application in either way. This is not the requirement of a law when bail application involving the offence under IPC is to be decided. So, the question what will be the binding effect of the observations made while deciding the bail application.

24. So also, in case of *State of Tamilnadu by Ins. Of Police Vigilance and Anti Corruption v/s. N. Suresh Rajan and Ors.*¹¹ relied upon by Mr.Solkar, it is observed that ‘*mini trial cannot be conducted*’. The materials collected during investigation are to be considered as a true materials.

25. Whereas, in case of *Prakash Digambar Lanjekar* (supra), the learned Single Judge of this Court while deciding a revision application was pleased to reject the contention about “*insufficiency of*

¹¹ MANU/SC/0011/2014

material at the time of framing of charge". The Court has differentiated in between the points raised which can be considered as a defence at the time of trial and the points which can be accepted for discharging the Applicant.

26. Whereas, the judgment in case of ***Ashok Pawale*** (supra), was arising out of quashing Petition. There was death of 3 students caused due to collapse of a slab and wall of a class-room of Zilla Parishad at Ahmednagar district. The offence was under Section 304 read with 34 of the IPC. This Court has refused to quash the FIR.

27. In case of ***Ghulam Hassan Beigh v/s. Mohammad Maqbool Magrey and Ors.***¹², there was a discharge for the offence under Section 302 of the IPC. (Para No.6). The said order was confirmed by the High Court. (Para No.12). Once the charge is framed, what are the limitations on the Prosecution and what is the duty of the Accused were explained in Para Nos.31 and 32. If a charge for lesser offence under Section 304 is framed, then prosecution cannot adduce evidence to prove the offence under Section 302 of the IPC. At the same time, the Accused need not deal with the evidence

¹² AIR 2022 SC 5454

adduced in order to prove the offence for which he is not charged. On the basis of facts, the Hon'ble Supreme Court observed that "*framing of charge under Section 302 of the IPC ought to have been done, still the Accused has got right to convince the trial Court that lesser offence is disclosed.*" (Para No.33).

28. In case of ***G.A. Rajegauda v/s. State of Maharashtra***¹³, learned Single Judge has refused to accept the prayer for discharge for the reason that the grievances are outside the scope of discharge and mini trial cannot be conducted.

29. If the principles laid down in above referred judgments are considered, it is settled law that detailed scrutiny is not expected while hearing the discharge Application. So also, there are limitations when this Court is exercising revisional jurisdiction. Only the legality of the findings need to be considered. On this background, I will deal with the nature of materials alleged against the individual Applicants and satisfaction of the ingredients of the offences charged. Firstly, I will deal with the ingredients of the offences charged. The offences mentioned in the charge-sheet are 304, 420, 465, 467, 468, 120-B,

13 Criminal Revision Application No.642 of 2016 : 10th July 2018 : Bombay High Court

471, 201, 337, 338 read with 34 of the IPC. The major offence is under Section 304 of the IPC.

Difference between Section 299 and 300 of the IPC

30. It is true that there is a difference in between the offence of ‘murder’ and the offence of ‘*culpable homicide not amounting to murder*’. **Section 299** of the IPC lays down the meaning of the offence of ‘*culpable homicide*’. Whereas, **Section 300** of the IPC clarifies which acts fall within the purview of ‘*culpable homicide*’ not amounting to murder.

31. Section 299 lays down **3 clauses** whereas, there are **4 clauses** in Section 300 of the IPC. It is true that Section 300 is in two parts.

- (a) First part deals with the acts which can be termed as ‘murder’,
- (b) whereas, second part excludes certain acts from the purview of ‘murder’ and treats them as ‘*culpable homicide not amounting to murder*’.

Though these acts fall within either of the 4 clauses, still the legislatures considered the circumstances in which those acts are

committed and reduces the gravity from ‘*murder*’ to ‘*culpable homicide not amounting to murder*’.

32. It is true always, it is a question of debate whether alleged act falls within the meaning of ‘*murder*’ or falls within the meaning of ‘*culpable homicide not amounting to murder*’. However, the Hon’ble Supreme Court right from the judgment of *Virsa Singh v/s. State of Punjab*¹⁴ has laid down the parameters which helps the Court in taking proper decision.

33. When we compare the provisions of Section 299 and Section 300 of IPC, we may find that the acts prescribed in Section 299 are **general in nature** whereas, those laid down in Section 300 are **more specific in nature**. That is why, *it is said that Section 299 is genus whereas, Section 300 is its species*. It is further said that *all murders are culpable homicide but all culpable homicides are not murders*. On perusing these two provisions, we can elaborate them as follows:-

<u>Section 299 of the IPC</u>	<u>Section 300 of the IPC</u>
<u>Clause (a)</u> When the act is done with	<u>Firstly</u> When the act is done with the

¹⁴ AIR 1958 SC 465

intention of causing death	intention of causing death. <i>There is no variance in these two clauses.</i>
<u>Clause (b)</u> When the act is done with the intention of causing bodily injury as is likely to cause death. <i>However, clause (b) does not specify to whom, the offender intended to cause bodily injury.</i>	<u>Secondly</u> There is also emphasis on intention and that too, of causing bodily injury. This is clarified in this clause. There has to be a connection in between the intention of the offender to cause bodily injury on one hand and that too, the death must occur of that person only. <i>In other words, clause (b) is general in nature whereas, second clause specifies the correlation in between the Accused and the deceased.</i> <u>Thirdly</u> It also talks about intention to cause bodily injury as likely to cause death. However, just like clause secondly, it does not mention about the nexus in between the intention of the

	offender and the person whose death is intended. It only talks about the intention to cause bodily injury and there may be a death of any person. However, an injury must be sufficient to cause death in an ordinary course. <i>In other words, clause (b) of Section 299 is general in nature whereas, clause secondly and clause thirdly of Section 300 specifies whose death is intended or general intention.</i>
<u>Clause (c)</u> It talks about knowledge. Here intention does not play any role. If the offender is having knowledge that his act will cause a death, it is sufficient. It does not talk about whose death is likely to cause.	<u>Fourthly</u> Clause fourthly also talks about knowledge by committing the act. The offender should know that it may cause death or it may cause bodily injury which is likely to cause death. The only test is – <i>(a) an act must be eminently dangerous and</i> <i>(b) In all probabilities, will cause a death.</i>

34. The issue involved in this revision is not restricted whether offence under Section 299 or under Section 300 is disclosed? The issue is whether an offence under Section 304 or under Section 304-A is disclosed. The question is, when Section 304 gets attracted.

Ingredients of Section 304 of IPC

35. Let us see the ingredients of Section 304 of the IPC. It is also in two parts. It is as follows:-

(a) Part I	When the death is caused with intention, the intention must be - (a) to cause death, or (b) cause bodily injury as is likely to cause death. It falls under Part I of Section 304 having maximum punishment of life imprisonment.
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The emphasis is on ‘*intention*’. Question is, the intention “to cause death or cause bodily injury as is likely to cause death” is also covered under clause firstly, secondly and thirdly of Section 300. So, always the Courts are faced with difficult situations as to when such acts will fall under Section 300 and which acts will fall under Section 304, Part I of the IPC.

Exceptions to Section 300 of IPC

36. The answer is provided in second part of Section 300 of the IPC. Second part of Section 300 lays down in which cases “the act of culpable homicide” will not amount to murder. These are the 5 exceptions. So, if there is a murder with requisite intention and if the Accused brings his case within any of the exceptions, the act will fall within the purview of Section 304, Part I of the IPC. This is not prescribed in any of the section but it is by way of judicial interpretation.

37. The reason is, if the act falls within any of the exceptions, certainly the accused does that act due to some provocation or right of private defence or under other categories. So, on his own, he does not commit that act but when he does that act, he is having the intention either to cause the death or bodily injury likely to cause the death. That intention is not formed by him on his own but that is effected by some act on the part of the deceased.

38. Now, the question is, which acts fall under **Section 304, Part II** of the IPC. When an act is done with the knowledge, it falls

within this part.

(a) Part II	There may be knowledge to the Accused - (a) that death may ensue (but not having an intention) or (b) there may be knowledge to cause bodily injury as is likely to cause death. There is maximum punishment of ten years.
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If we correlate this part to Section 300, we may find that clauses firstly, secondly and thirdly of Section 300 are excluded because it does talk about an intention and but the knowledge.

39. The question is, when there is a knowledge (that either death will cause or bodily injury which may subsequently results into death), why it will fall under Section 304, Part II and not under Section 300. If we minutely read clause fourthly and second part of Section 304 of the IPC, **we may find that the wordings are different.** What clause four of Section 300 mentions is about two conditions about 'knowledge':-

- (a) The act must be imminently dangerous. It is not simply dangerous but there is high risk of causing death.
- (b) By that act, death is the only result. It means, death is not

simply possible but death is bound to occur.

Whereas, Section 304, Part II does not mention about “act is imminently dangerous” and “in all probabilities, it may cause death”. It means, if the death is caused due to the act of the Accused and he is having knowledge, it may fall under clause (fourthly) and murder, if those two conditions are satisfied and if those two conditions are not satisfied, it may fall under Section 304, Part II of the IPC. I am fortified by the view taken in case of ***State of Kerala v/s. Mani alias Chandran*** reported in 1992 Cr.L.J.1682 (Para No.12). It was explained with the help of illustration. If a person pushes another person in a burning pier or before running train, death is bound to occur. It will fall under Section 300 of IPC. Whereas, if a person pushes another person in a river, he may survive, if he knows swimming or helped by other person. So, death may or may not be possible. That is why, it will fall under Section 304, Part II of IPC.

40. **Learned Advocate Shri.Memon** submitted that the acts alleged against his client do not at all satisfy the ingredients of Section 304 of the IPC because the building has collapsed after 6 years and his

own relatives were residing in the said building and it cannot be accepted from his client he will sell the flats to his own relatives with this risk. Whereas, the contention of learned Advocate for the **Applicant – Yunus** is, he is not the developer and not concerned with the construction activity and on the basis of all the acts alleged, how he can be attributed the knowledge. Whereas, the learned Advocate for the **Applicant – Dhamane** submitted that there is absolutely no material to show the connection with his client with the project. These contentions are refuted by learned Special Public Prosecutor Mr.Solkar.

41. It is very well true that the building has collapsed after the period of 6 years. It means, it has not collapsed immediately after the construction. For imposing punishment under Section 302, an act must be imminently dangerous and the death will be the only outcome (clause fourthly of Section 300). ***Prima facie*, I feel these acts do not fall within the purview of clause fourthly.**

Whether Section 304, Part II is justified

42. Now, the question is, whether it falls within the purview of

Section 304 Part II of the IPC? There is an alternate submission made by learned Advocate Mr.Memon that at the most, the act will fall within the purview of Section 304-A of the IPC and to buttress his submission, he relied upon following judgments:-

- (a) *Abdul Salim Shaikh (Siddique) and Anr. v/s. The State of Maharashtra*¹⁵
- (b) *Keshub Mahindra v/s. State of M.P.*¹⁶.

Whereas, Mr.Solkar relied upon the observations in case of *Shaji v/s. The State of Kerala*¹⁷.

43. It is true that the learned Single Judge of this Court while dealing with a case of *Abdul Salim Shaikh (Siddique) and Anr. v/s. The State of Maharashtra*¹⁸ and other connected Applications have come across the prosecution for the offences under Sections 304, 336, 337, 338 read with 34 of the IPC. Even the provisions of the Prevention of Corruption Act, 1988 (henceforth, “the PC Act”) were also invoked because the Municipal Officers are also involved. The building collapsed and 74 persons have died and 62 were injured. The

15 Criminal Bail Application No.850 of 2014 : 28th October, 2014 : Bombay High Court

16 1996 (6) SCR 129

17 Criminal Appeal No. 2293 of 2023 : 7th August 2023 : Supreme Court of India

18 Criminal Bail Application No.850 of 2014 : 28th October, 2014 : Bombay High Court

knowledge that the building will collapse was attributed to the Accused persons. Learned Single Judge has conducted an enquiry whether the facts alleged, makes out a case of an offence under Section 304 of the IPC. (Para 21).

44. Learned Single Judge opined “*degree of criminality does not depend upon the consequences*”. Mean to say, even if consequences are serious (death by rash and negligent driving under Section 304-A of the IPC), punishment may not be serious. However, on other occasions, the consequences may not be serious (for example, an attempt to kill by firing and even though it does not hits the victim), but there is higher punishment upto ten years / life. Learned Single Judge intended to mean that even though the number of persons have succumbed to the injuries, it does not mean that the claim of the prosecution to invoke a particular section of the IPC involving higher punishment is justified. (Para 26).

45. Learned Single Judge granted bail and observed:-

“The provisions of Section 304 of the IPC cannot be invoked but at the most, the provisions of Section 304-A of the IPC can be invoked”. (Para 35).

46. Learned Single Judge differentiated in between the knowledge and awareness of the risk involved. According to him, the awareness can be imputed on the Accused who went ahead with the construction even though aware of the risk. (Para 32). According to Mr.Solkar, these observations are unwarranted while deciding a bail application.

47. It is true that in the Code of Criminal Procedure, certain stages are prescribed and the nature of enquiry required to be followed is also judicially interpreted. The stages include, dealing with remand application, issuing a process, hearing discharge application, hearing bail application, hearing quashing petition and deciding the case finally after evidence is recorded. The Court is expected to give its opinion about the materials on the basis of stage of that case, so to say, Court is required to assess the material for deciding the prayer made at that stage. At an interim stage, the Court is not expected to decide whether the guilt is proved or not. At the time of hearing of bail application, the Court is expected to assess the materials to decide about the entitlement to bail. The Court is not supposed to inquire whether the materials collected is a result of shoddy investigation.

48. ‘*Intention*’, ‘*knowledge*’, ‘*motive*’ and ‘*awareness*’ are the indication of thinking of a person. It relates to the state of mind of person. Only when any act is done in execution of this state of mind, one can understand about the state of mind of that person. It is true ‘*intention*’ indicates what a person is expecting and the word ‘*knowledge*’ is used when a person is aware about the existence of a particular fact. Whereas, ‘*motive*’ is used to indicate for what purpose, a person has done a particular act. Whereas, the word ‘*awareness*’ is used when a person is conscious of a particular fact. Knowledge implies certain level of certainty. Whereas, awareness may or may not involve certainty.

49. It is true that in Section 299 to Section 304 of the IPC, the word ‘*awareness*’ is not used. What is used is ‘*intention*’ and ‘*knowledge*’. Learned Single Judge has differentiated in between ‘*knowledge*’ and ‘*awareness*’ on the basis of facts of that case. He holds the Accused were aware about the consequences. He holds ‘*knowledge*’ cannot be imputed to them. I think, when legislatures have never used the word ‘*awareness*’ why to dissect all the materials by emphasising the difference in between the word ‘*knowledge*’ on one hand and the

word ‘awareness’ on the other hand. Such a dissection may not be done at the time of hearing of bail application. So, with respect to those observations, I am not inclined to accept them while deciding these Revision Applications involving an offence wherein ‘knowledge’ as one of the prerequisite.

50. It is true that in case of ***Keshub Mahindra*** (supra), the Hon’ble Supreme Court has quashed the charge under Section 304 of the IPC and in exercise of power under Article 142 of the Constitution directed the trial Court to frame a charge under Section 304 of the IPC. Mr.Memon relied upon those observations. It was a case involving death of 3828 humans and thousands of person injured. (It is known as ‘*Bhopal Gas Case*’).

(a) It was due to leakage of toxic gas at Bhopal. On facts, it was observed:-

“By running a plant storing highly dangerous and volatile substance in the storage of a tank will cause hurt cannot be attributed”.

51. It was observed:-

“The material on record must at least prima facie show that accused is guilty of culpable homicide and the act

allegedly committed by him must amount to culpable homicide. However, the materials fall short of even prima facie case indicating that the accused is guilty of an offence punishable under Section 304 Part I or Part II of the IPC”.

It is further observed:-

“The material must indicate that the accused had done the act which had caused death with at least such knowledge that he was by such act, likely to cause death”.

It is further observed:-

“It cannot be disputed that mere act of running a plant as per the permission granted by the authorities would not be a criminal act even assuming that it was a defective plant and it was dealing with a very toxic and hazardous substance. Mere act of storing such a material could not even prima facie suggest that concerned accused had requisite knowledge”.

52. These observations are on the basis of facts of that case.

The ratio is:-

“A person can be prosecuted for the offence under Section 304 of the IPC if knowledge that death may ensue or bodily injury caused by him is likely to cause the death are the requirements”.

As said above, knowledge should not be of such a degree that by the alleged acts, death will be certainly the outcome. The test of ‘*imminently dangerous*’ and the test of ‘*fullest probability*’ are applicable in case of clause fourth of Section 300 of the IPC. They are not the requirements for an offence under Section 304 Part II of the IPC. The facts of this case need to be ascertained.

53. Whereas, in case of ***Shaji*** (cited supra) relied upon by Mr.Solkar, the Hon’ble Supreme Court modified the conviction from Section 302 to Section 304, Part I of IPC. The accused father attacked his minor son who has refused to purchase a cigarette lighter. After the assault, the father tried to revive the deceased. The principles reiterated in case of ***Anbazhagan v/s. The State Represented by the Inspector of Police***¹⁹ were reproduced. It seems that the benefit of exception to Section 300 of the IPC was granted to the Appellant. In this case, the issue is different.

54. The issue is, whether it can be said *prima facie* that the Accused have committed the offence under Section 304 of the IPC. However, the principles laid down in case of ***Anbazhagan*** (supra) are

¹⁹ 2023 (10) SCALE 173

relevant. **There is a discussion** when an offence under Section 304, Part I of the IPC is made out. **There is also discussion** about the difference in between clause fourth of Section 300 on one hand and the offence under Section 304, Part II of the IPC on the other hand.

Observation about facts

55. After considering the submissions and the principles laid down in above mentioned judgments, the factual aspects need to be considered. It is true that the **Applicant Yunus** and **Irfan** are not the persons on whom, there is a responsibility to carry out the construction. The **Applicant Yunus** is a son of the owner who is not charge sheeted whereas, the **Applicant Irfan** who is cousin brother of the Accused developer Farooque. Merely on the basis of their relations, they cannot be booked for any offence.

56. When I have perused the materials placed against both of them, what I find is, the **Applicant Yunus** is involved in not only interacting with the perspective purchasers, signing as a witness to the agreements but on some occasions, even he has accepted a part consideration. Even some of the statements suggest that he was

involved in purchasing the raw materials like bricks. He is the person who used to visit the site and supervise the construction. Even some complaints are made about the inferior material when the construction was going on. Even after completion of building, his role continued. He is the person involved in collection of amount of maintenance required for installing new electric connections when the earlier was burnt. Even some complaints were made about defects in the construction by the occupiers, he has not paid heed to them. On the basis of all these allegations, can we say that he was having knowledge about the use of defective materials and knowledge that after construction, the building may fall, causing death or injury? The Police have also invoked Section 34 which lays down the principle of '*vicarious liability*'.

57. Whereas, against **Applicant Irfan**, there are also allegations that he used to dodge the answers about deficiency and used to convince the flat purchasers. Even, he is the person who used to participate in the closed-door meetings with the engineer. At the time of construction, when the witnesses have said about use of gypsum material, the Applicant tried to convince them about new technology

and it is also being used in Mumbai. Even he has collected the amount for new wiring when the earlier electrical wiring was burnt. Those statements indicate that he was involved when the construction was going on and even after construction.

58. It is true that the majority of the statements pitted against him were recorded earlier to his arrest. They are part of the first charge-sheet. The first charge-sheet was filed on 9th December 2020. At that time, the **Applicant Irfan** was not arrested. He was arrested on 27th June 2021 and subsequently, charge-sheet was filed against him. So, the contention of Mr.Memon cannot be accepted. I do not find actionable lapse on the part of Investigating Agency so as to give benefit of discharge to this Applicant.

VJTI Report

59. It is material to note that the Police have inspected the site through the engineers of VJTI. A copy of their report is tendered by Mr.Solkar. Some of the findings are as follows:-

- (a) **Quantity of reinforcement** provided as per structural drawings **are not adequate** to carry out the loads as per I.S

Code requirements and **dimensions of the footings were not adequate.**

- (b) The variation in the values indicates the **quality of concrete in tested RCC samples is inconsistent and poor at many locations.**
- (c) **The quality of concrete in tested RCC samples is doubtful.**
- (d) **The comprehensive strength of concrete is less than the design strength of concrete.**
- (e) **The footings are not rested on equivalent stratification which may lead to differential settlement among the footings.**
- (f) **No PCC observed below the footing.**

Summary

60. On the basis of above allegations, *prima facie* it can certainly be said that both these Applicants were involved in the construction activity and when the construction was going on and they were also involved after the purchasers were put into possession. The question is, why they were involved? It is for them to explain. It can certainly be said that by those facts, they have assisted the Accused No.1 developer – Farooque in carrying out the construction activity. It

can also be said that both were aware about the grievance of inferior material. These materials placed against them are sufficient to infer they are privy to the offence. **So, I am not inclined to accept their contention about discharge.**

61. It is true that some of the Municipal Officers are also named in the charge-sheet but up till now, there is no sanction. The role of those Officers and all these individuals are different. The allegations against them is about not fulfilling their responsibilities properly. Whereas, the roles alleged against private persons is that of use of inferior materials, not taking proper care, not paying heed to the complaints made by the perspective purchasers. These materials do indicate the involvement of both these Applicants in the commission of the offence. **I hold that the offence under Section 304 Part II of the IPC is *prima facie* disclosed.** It can certainly be said that **these two Applicants have helped the developer in carrying out the construction involving inferior materials.** It can be said that they have shared a common intention with the developer that death may occur if the building will collapse due to faulty materials and not taking proper care. **Certainly knowledge can be attributed that the occupants may**

sustain injuries which may result into death if the building will collapse.

About Section 304-A of IPC

62. Section 304-A of the IPC stands on a different footing. Section 304-A of IPC can be invoked only when the act does not amount to ‘*culpable homicide not amounting to murder*’. On reading Section 304-A of IPC and Section 304, we may find the difference in their wording itself. Section 304 is applicable when intention / knowledge is to cause death or bodily injury as likely to cause death. Whereas, in case of Section 304-A of IPC, there is emphasis on either rashness or negligent act. This Section will be applicable only when the act is not done with intention or knowledge. There must be rash or negligent mind and not intentional mind when provisions of Section 304-A of IPC are invoked.

63. When there is an allegation of rash and negligent act, normally the consequences ensues immediately or within short span of time. There can be **rashness** “if a person does the act by crossing all the reasonable limits” whereas, there is a **negligent act** “when an act is done

without taking care neglecting the surrounding circumstances”.

64. In this case, the defective materials are used and proper care while doing construction was not taken. The collapse of the building was not immediate. But, certainly those acts involve a degree of criminality higher than simple rashness or negligent act. Rash and negligent act may take place within short period of time but the acts falling within the purview of Section 304 Part II of the IPC involve the performance of the acts for a longer duration. It involves series of acts.

65. If we consider the report given by the VJTI, we may find that there are certain inherent defects in the construction carried out at the site. There is no other reason cited by either side for collapse of the building. It is not “part of the building has collapsed”. In fact, all the 5 floors have collapsed. It means, there were lacunae in the foundation, in the RCC materials and other craftsmanship. Such incident of entire collapse takes place only when there are structural defects. Merely because the building has survived for 6 years, the Accused cannot be given a benefit at this stage. So, I do not accept the contention of Mr.Memon that at the most, the offence under Section 304-A of the IPC is disclosed. No doubt, these are my *prima facie* observations. But

certainly, materials are sufficient to frame charges.

66. But, I feel is, the trial Court can frame alternate charge for an offence under Section 304-A of IPC. It is less serious than an offence under Section 304 of IPC. If, after completion of the evidence trial Court finds that offence under Section 304 is not made out but offence under Section 304-A of IPC is made out, then trial Court is at liberty to pass appropriate orders. Even, defense will also get an opportunity. Their interest is also protected.

Allegation against Applicant - Dhamane

67. It is true that at the time of framing of charge, test of '*proof of offence beyond reasonable doubt*' is not to be applied but Court has to see whether there is sufficient ground to proceed against the Accused. The Court has to see whether on the basis of materials, whether there is a grave suspicion that the Accused has committed the offence. It is true that the Applicant is a professional person who is involved in designing the structure. It is true that such a professional is having great role to play during the construction activity. He is expected to prepare the drawings of the building and is expected to supervise the construction. He is expected to guide the developer. He

also acts as a conduit in between the developer on one hand and the local Authority on the other hand. He represents the developer to the local Authority.

68. It is true that the local Authority also consists of the experts in the field of construction activity. They are the town planners, engineers and so on. **They have got role to play at two stages. First**, when the plans and designs are submitted to them, they have to check them on the basis of Development Control Rules. (henceforth, “the DC Rules”). **Secondly**, at the time of execution, they are supposed to visit the site and verify whether the construction is carried out as per the sanctioned plan.

69. It is important to note that the prosecution is handicapped in collecting the documents from Mahad Municipal Council. The reason that they are not traceable. As per Mr.Solkar’s submission, the relevant file was not available particularly after the collapse of the building. The relevant documents consist of the application for building permission annexed with the proposed plan and other documents as per the DC Rules. It is true that during the construction, the necessary intimations are required to be given to the Council

informing them about the stage of the construction. The construction so far carried out needs to be certified by the architect and engineer. The Municipal Officers involved in the process consist of following persons:-

(i)	Sanjay Govind Shinde : worked as Chief Officer of Mahad Municipal Council	Both were involved in the process of issuing building permission on 11 th May 2011.
(ii)	Devendra Madhukarrao Morkhandikar : worked as an Engineer	
(iii)	Shashikant Vitthoba Dighe:	Both are involved in the process of issuing occupancy certificate.
(iv)	Deepak Genbhau Jhinjhad:	

It is submitted that Shri.Shashikant Dighe and Shri.Deepak Jhinjhad are to be charge sheeted and the proposal for obtaining sanction from the Government is submitted. The fact that these Officers are on the radar of the Police is important (whether the sanction will be obtained or not) gains importance when there is an allegation of the concerned file from the record of the Council is not available. One does not know whether it was misplaced deliberately or not and who are involved. These factors are important for deciding the discharge claim made by the Applicant before the trial Court and the legality of those findings.

70. The important piece of evidence placed against this Applicant is furnishing stability certificate by the Applicant for and on behalf of Shravani Consultants. The Applicant claims that he has not signed on that certificate. Though he was arrested, it is submission by Mr.Solkar that he has not cooperated by producing necessary RCC design. There is counter version to this allegation. According to his Counsel, how he will produce the plan particularly when he has not acted as an RCC Consultant.

71. **It is true that the prosecution has not produced any document to show the Applicant acted as an RCC Consultant except the copy of certificate of stability.** At this stage, we can say **that it is for two reasons.** First, really the Applicant has not acted as an RCC Consultant or he has acted as a Consultant but the file containing relevant papers is not traceable. There is a reason to believe that he acted as an RCC Consultant for the said project. There is a statement of one **Ramchandra Vitthal Marathe** who worked as an engineer in Shravani Consultants. If his statement is perused, we can certainly infer that the present Applicant has worked with the developer Farooque Qazi and architect Gaurav Shah in other projects. It is true that

Mr.Marathe in candid terms has not stated about preparing RCC drawing by his employer that is present Applicant. But, we can certainly infer that Mr.Marathe has visited the Kajalpura site on the instructions of his employer, the present Applicant. He has stated about differences about the execution of work with the developer and he has informed this fact to his employer. These facts do suggest that at some point of time, the present Applicant worked as an RCC Consultant for the said project. No doubt, the witness Mr.Marathe has stated, after some stage, neither he nor the Applicant has visited the site.

72. It is also true that the Investigating Officer has taken handwriting samples of the Applicant for comparing it with the signature on copy of the stability certificate. It is also true that the State Handwriting Expert has given an opinion that the materials fall short to conclude that the signature on that handwriting belongs to the Applicant.

73. On the basis of above materials, whether a charge can be framed against the Applicant, is a moot question. Learned Advocate argued vehemently to satisfy this Court for discharging the Applicant.

These materials need to be considered vis-a-vis the allegations against the Applicant. His role is that of professional consultant. There is already VJTI report pointing out certain deficiencies in the construction.

74. I have also perused the impugned order dated 2nd September 2023. Learned trial Judge opined that *prima facie*, the involvement of the Applicant is disclosed. The materials referred in the order is already reproduced by me hereinbefore. Strictly speaking, there is only statement of the witness Ramchandra Marathe. **He has stated about his visit²⁰**. As stated above, no single letter or document is pointed out to me on behalf of the prosecution showing that the Applicant worked as an RCC Consultant. Apart from recording the statement of witness Mr.Marathe, no statements are pointed out to me showing the involvement of the Applicant in the project as an RCC Consultant. The Investigating Officer could have recorded the statements of the persons involved in the construction activity. That was perfectly within his domain. Why such statements are not recorded or not pointed out to me is a question. The Court can understand

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about the difficulty in seizing the papers from Mahad Municipal Council Office because they are not traceable as per the prosecution case. It is also true that the prosecution made an attempt to seize the relevant documents by custodial interrogation. However, they were not successful.

75. **Further he has also clarified why Applicant stopped future visit.**²¹ It is on account of the difference of opinion between the Applicant and the Developer. We have to read the statement as it is. If a part of the statement is beneficial to the prosecution, other part is not beneficial to the prosecution but the Court has to read the statement as a whole.

76. No doubt, being an RCC Consultant, the Applicant has got a role to play in carrying out the construction. He has got a responsibility and authority to tell the Developer that construction is not going on as per the RCC design. On this aspect also, no statements are pointed out to me on behalf of the prosecution. Being an expert, his role is secondary. The prosecution can certainly say that if the Applicant could have supervised the work properly, then mishap could

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have been avoided but allegations need to be fortified by the materials collected during the investigation.

77. The Court is aware that at the stage of framing of charge, dissection of material is not possible. *The Court could have given a priority to the report of the VJTI only when materials against the Applicant are collected.* Unfortunately, it has not happened. Handwriting expert opinion is also against the prosecution. No doubt, the correspondence made by Verticals Architect to Chief Officer is annexed to the Application. Letter is about completion of construction upto plinth level. There is plinth level certificate also. It also mentions about execution of the work under the supervision of Structural Engineer. It is true that certificate of the Engineer is not annexed. If the Investigating Agency could have recorded the statements of witnesses suggesting presence of the Applicant at the spot, even the Court could have overlooked the circumstance about misplacing of papers. So, I conclude that there is no sufficient material to proceed against the Applicant. The findings given by the trial Court is erroneous. It is true that if the charge is framed, a person is required to undergo the ordeal of trial. Ultimately, these materials even do not

show *prima facie* involvement, it is not justified by asking the Applicant to face the trial. So, I am inclined to accept his prayer for discharge. Hence, the following order :-

ORDER

- (i) The Criminal Revision Application No.107 of 2023 and the Criminal Revision Application No.66 of 2023 are dismissed.
- (ii) The Criminal Revision Application No.144 of 2024 is allowed.
- (iii) The order dated 2nd September 2023 passed by the Court of Additional Sessions Judge, Mangaon-Alibag is set aside.
- (iv) The Applicant – Bahubali Tatyaso Dhamane (Original Accused No.3) is discharged from Sessions Case No.21 of 2020 for the offences punishable under Sections 304, 420, 465, 467, 468, 120-B, 471, 201, 337, 338 read with 34 of the IPC.
- (v) The observations made in this order are only for the purpose of deciding the discharge prayer.
- (vi) The trial Court to decide the matter on merits without being influenced by the aforesaid observations.

78. The Criminal Revision Applications are disposed of in the above terms.

[S. M. MODAK, J.]

79. After pronouncing the order, learned Advocate Shri.Mulani submitted that he has got instructions to challenge this order and he prayed for direction to the trial Court not to frame a charge for one month.

80. It is opposed by learned Special Public Prosecutor Shri.Solkar. According to him, one of the Co-accused is granted bail just because the trial is not started. In fact, he prayed for issuing direction to the trial Court to expedite the hearing.

81. It is true that due to pendency of these Revision Applications, framing of charge is already delayed. So, I am rejecting the prayer for issuing the necessary directions not to frame charge. I do not think, framing of charge will come in the way of the Applicant Yunus Shaikh to challenge the order before the Hon'ble Supreme Court. In fact, the facts and circumstances warrant me to issue directions to the trial Court to expedite the trial and dispose it of as early as possible.

[S. M. MODAK, J.]