

(2019) 11 JH CK 0020

In the Jharkhand High Court

Case No : Criminal Miscellaneous Petition No.515 Of 2008

Bhushan Lal Raina And Os

APPELLANT

Vs

State Of Jharkhand And Ors

RESPONDENT

Date of Decision : 18-11-2019

Acts Referred:

Indian Penal Code, 1860 — Section 32, 33, 36, 287, 337, 338
Code Of Criminal Procedure, 1973 — Section 154, 155, 155(2), 155(4), 482
Constitution Of India, 1950 — Article 21

Citation : (2019) 11 JH CK 0020

Hon'ble Judges : Anubha Rawat Choudhary, J

Bench : Single Bench

Advocate : Indrajit Sinha, Pradipto Mitra, Shiv Kumar Sharma

Final Decision : Dismissed

Judgement

1. Heard Mr. Indrajit Sinha, counsel appearing on behalf of the petitioners along with Mr. Pradipto Mitra, Advocate.

2. This petition has been filed for the following relief:

"For quashing the entire criminal proceedings initiated as against the petitioners in connection with Bistupur Police Station Case No.68 of 2007 corresponding to G.R. No.497 of 2007, including the order dated 26.10.2007 passed by the learned Chief Judicial Magistrate, Jamshedpur, whereby and whereunder he has been pleased to take cognizance of the offence under Sections 287, 337 and 338 of the Indian Penal Code as against the petitioners, and all further proceedings subsequent thereto in the said Bistupur Police Station Case No.68 of 2007 corresponding to G.R. No.497 of 2007, now pending in the court of learned Judicial Magistrate, Jamshedpur."

3. The prosecution story in brief is that one Bistupur P.S. Case No. 68 of 2007 dated 02.03.2007 was registered on the basis of the fardbayan of Mrs. Manju Kumari recorded on 28.10.2006, wherein, inter alia, she has alleged that on

24.10.2006, she along with her husband and children had visited Jubilee Park and had taken a ride on "Moon Maker" and in course of the ride, the same malfunctioned, as a result of which she fell down and received head injury and her husband received minor injuries. She has further alleged that there was no safety belt on that ride and it is because of the negligence of the petitioners, the incident took place. It has also been alleged that the safety belts were there when on earlier occasion they had taken a ride. It has been alleged that the owners of the ride are (chairman) Raina (petitioner no. 1), manager Mohanty, JUSCO Management and Sanjiv Bhan (petitioner no. 2). It is alleged that the accident had taken place due to negligence of Raina (petitioner no. 1), Mohanty and Sanjiv Bhan (petitioner no. 2).

4. The learned counsel for the petitioners submits that the petitioners have been arrayed as an accused for the reasons that the petitioner no.1 is said to be the Chairman, whereas the petitioner no.2 is said to be the Manager of the Company which runs the Amusement Park. It is submitted that the Amusement Park is owned and managed by a Company namely Nicco Jubilee Park Limited and at that relevant point of time, the petitioner no.1 was the Chairman and the petitioner no.2 was the Manager In-charge.

5. The learned counsel for the petitioners further submits as follows:

- a) The allegation made in the FIR does not disclose commission of any offence, as against the Petitioners.
- b) The fardbeyan of Mrs. Manju Kumari, even if taken to be true in its entirety, does not disclose commission of a cognizable offence and, hence, F.I.R. could not have been registered.
- c) The petitioners cannot be criminally prosecuted only because they held the post of Chairman and Manager In-charge respectively in the Company at the relevant point of time, as the concept vicarious liability is not applicable to criminal proceedings.
- d) The informant has narrated a completely different story in the civil suit instituted by her regarding the same accident / incident and, therefore, the continuance of the criminal prosecution would be an abuse of process of law and will result in miscarriage of justice.

6. Re: point (a) it is submitted as under :

(i) It is submitted that even if assuming, though not admitting that the allegations made in the fard bayan of Mrs. Manju Kumari are taken to be true in its entirety, the same does not disclose commission of any offence far less the offences alleged.

(ii) Admittedly, the petitioners were not present, when the accident / incident took place. No overt act has been alleged to have been committed by the petitioners. They have been arrayed as an accused only by virtue of their

positions in the Company by merely stating that they are responsible.

(iii) In the fard beyan, the informant has alleged that the ride namely "Moon Maker" malfunctioned and she fell down because there were no safety belts. Though the petitioners vehemently deny the allegation regarding unavailability of safety belts on the ride, but, assuming for the present that there were no safety belts, the issue which falls for consideration is whether the petitioners can be said to have committed an offence punishable under Sections 287, 337 and 338 of Indian Penal Code by omitting to perform their duty, if any.

Sections 337 & 338 of Indian Penal Code:

(iv) It is true that an offence under Sections 337 or 338 of Indian Penal Code is capable of being committed by omission, but, it is equally true that for an omission to attract criminal liability, it requires failure on the part of the accused to perform / discharge his duty / liability imposed by a law and the physical capacity to perform the act.

(v) The Hon'ble Supreme Court in the case of P.B. Desai Vs. State of Maharashtra [(2013) 15 SCC 481] in paragraphs 28 to 32 has elaborately dealt with the issue as to whether Section 338 of Indian Penal Code recognizes that the particular offence may be committed by omission.

(vi) Thus, from the above, it is evident that in order to attract the provisions of Sections 337 and 338 of Indian Penal Code in the case of omission, the following must be ex-facie present: -

A. The accused must have a legal duty to act and such legal duty must arise either from the offence definition or some other provision of criminal or civil law. In other words, the liability under Section 337 or 338 of Indian Penal Code would be attracted only when there is a clear statutory language casting an obligation on the accused to do a particular act;

B. The accused must have the physical capacity to perform the act;

C. A moral duty to act is not sufficient to attract the liability under Section 337 and 338 of the Indian Penal Code;

(vii) In the instant case neither the informant has alleged nor has the Police found that the petitioners were under any statutory obligation / duty to ensure that belts must be available on the ride or for that matter it was their duty to ensure proper maintenance of the ride / machine. To the best of the knowledge of the petitioners there is no statute in force in India which fastens any liability qua operation and maintenance of rides in an amusement park upon the petitioners or on the office which the petitioners held at the relevant time.

(viii) A liability for purported omission on the part of a person may give rise to civil and / or criminal consequences, but, a person cannot be criminally prosecuted unless it is shown that law imposed a duty to act on a person and only when such obligation exists, his or her illegal omission to act would render

him/ her liable for punishment under the criminal law.

(ix) In absence of any such material, viz. that the petitioners were under any statutory duty to ensure the proper functioning of the ride, it is submitted that the impugned prosecution against the petitioners is wholly unjustified and illegal. Thus, it is submitted that no offence under sections 337 / 338 IPC can be said to be made out as against the petitioners.

Section 287 of Indian Penal Code:

(x) Unlike sections 337 / 338 IPC, section 287 IPC by definition includes an omission to be punishable thereunder provided such omission as is sufficient to guard against any probable danger to human life from machinery had occurred knowingly or negligently and the machinery was in the possession or under the care of the accused.

(xi) The Supreme Court in the case of P.B. Desai (supra) has inter alia held, that the degree of negligence to attract criminal consequences must show that the negligent conduct involves a deliberate act subjecting another to risk of harm where the accused is aware of the existence of the risk and nonetheless proceeds in the face of the risk. In other words, the degree of negligence has to be conceptually in the realm of a recklessness to make it a criminal offence. If there is nothing to suggest that the accused was aware of the risk deliberately taken, then he is morally blameless and should face, at the most, a civil action for damages.

(xii) In the instant case, there is no allegation far less any cogent and admissible material to show that the petitioners were aware that the safety belts are not available (as alleged) and the existence of the risk involved in operating the ride without such safety belt and despite the same, the petitioners had chosen to permit the operation of the ride. Since none of the above three considerations can be answered in affirmative, the purported negligence of the petitioners cannot result in a criminal prosecution.

(xiii) Section 287 of Indian Penal Code is in two parts, the first part deals with an act done with any machinery so rashly or negligently as to endanger human life or to be likely to cause hurt or injury to any other person, whereas the second part deals with a situation where the accused knowingly or negligently omits to take such order with any machinery in his possession or under his care, as is sufficient to guard against any probable danger to human life from such machinery.

(xiv) The facts of this case, in so far as, the petitioners are concerned do not fall within the first part of Section 287 of the Indian Penal Code. So far as the applicability of the second part of Section 287 of the Indian Penal Code is concerned, it is submitted that the omission, if any, was not on the part of the petitioners and there is no material to indicate that the petitioners omitted to do something knowingly or negligently. Negligence in a penal statute has been held

to mean gross negligence, which has neither been alleged nor has any material come. Therefore, it is submitted that no offence under Section 287 of the Indian Penal Code can be said to be made out against the Petitioners.

7. Re: point (b) it is submitted as under :

(i) Admittedly, in the instant case, the accident / incident has taken place while the informant was on a ride (machine), which is operated by another person. It is submitted that in a case involving a machine, resulting in hurt / grievous hurt, the same cannot form a subject matter of an offence under Sections 337 and 338 of the Indian Penal Code in view of the special / specific provision of Section 287 of Indian Penal Code, more so, in light of the fact that Section 287 also covers negligent omission to take such order with any machinery in possession or under care of the accused, as is sufficient to guard against any probable danger to human life from such machinery. Reliance in this context is placed on the principle expressed in the maxims *Generalia specialibus non derogant* and *Generalibus specialia derogant*. Osborns Law Dictionary defines the former to mean "general things do not derogate from special things", whereas the later has been explained to mean "special things derogate from general things". The principle as contained in the said maxims has been used by the Hon'ble Supreme Court of India to resolve conflict between provisions in an Act, as also to interpret overlapping provisions in two different acts. Reliance is also placed on the judgment of the Supreme Court in the case "J.K. Cotton Spinning and Weaving Mills Co. Ltd. Vs. State of Uttar Pradesh [(1961) 3 SCR 185]". Further, the said principle had also been applied in resolving conflict between two provisions of Constitution of India.

(ii) The facts of this case reveal that the incidence / accident took place on account of malfunctioning of a machine and was further aggravated due to non-availability of safety belts. Thus, assuming the allegations to be true and without prejudice to the contention that even an offence under Section 287 of Indian Penal Code is not made out, as against the petitioners, it is submitted that in the case of this nature, Section 287 being a specific provision dealing with negligent conduct with respect to machines would prevail over the general provisions of Sections 337 and 338 of the Indian Penal Code and in the context of the present case, the allegations, therefore, would only make out a non-cognizable case. It is submitted that the leveling of sections in an F.I.R. or a Complaint is not an indicator rather the narration of facts disclose commission of a cognizable or a non-cognizable offence. In case of an F.I.R., a duty has been cast upon the Officer In-charge to ascertain that the information given to him relates to commission of a cognizable offence or a non-cognizable offence.

(iii) In the aforesaid background, the issue which falls for consideration is whether, even if assuming that an offence under Section 287 of Indian Penal Code is made out which is non-cognizable, the registration of the F.I.R. can be said to be legal.

(iv) In order to answer the above issue, the learned counsel has referred to section 154 and 155 of the Code of Criminal Procedure which deals with the procedure to be followed for cognizable and non-cognizable offences respectively ;

(v) It is also submitted that the scope and ambit of Section 154 of Cr.P.C. is no more res integra. The Hon'ble Supreme Court in the case of "State of Haryana Vs. Bhajan Lal" [1992 Supp.(1) SCC 335, paras-30 to 33] and a Constitution Bench of Hon'ble Supreme Court of India in the case of "Lalita Kumari Vs. Government of U.P." [(2014) 2 SCC 1, para-49] have held that the condition that is sine qua non for recording an F.I.R. under Section 154 of the Code is that there must be information and that the information must disclose a cognizable offence.

(vi) The procedure for dealing with information to the Police and their power to investigate the aforesaid two categories of offences have been laid down in Chapter XII of the Cr.P.C. As indicated above, when the Police receives an information disclosing commission of an cognizable offence, it is under obligation and duty to mandatorily register a First Information Report in terms of Section 154 of Cr.P.C., whereas if the information discloses commission of a non-cognizable offence, the Police has to follow the procedure as laid down under Section 155 Cr.P.C. i.e. to enter the substance of the information in a book to be kept by such officer in the prescribed form and refer the informant to the Magistrate. A statutory restriction has been imposed by sub-section (2) of Section 155 Cr.P.C. by mandating that no Police Officer shall investigate a non-cognizable case without an order of a competent Magistrate.

Similar observation was also made by the Hon'ble Delhi High Court in *Ajit Singh vrs State* (1989 SCC Online Del 267), wherein Hon'ble Court held that since the offence under Section 287 of the Indian Penal Code was non-cognizable wherein the permission of the Magistrate for investigation under Section 155 (2) of the Code of Criminal Procedure was not obtained, the continuation of the criminal proceedings before the Lower Court would amount to an abuse of process of Law.

(vii) In the case of *State of Haryana Vs. Bhajan Lal* (supra), the Hon'ble Supreme Court at paragraph 102(4), inter alia, held that the High Court in exercise of its inherent power under Section 482 Cr.P.C. can quash an F.I.R. and the proceedings arising there from, one of them being where the allegations in the F.I.R. do not constitute a cognizable offence, but, constitute only a non-cognizable offences, no investigation is permitted by a Police Officer without an order of Magistrate as contemplated under Section 155(2) of the Code.

(viii) Various High Courts of this country have also held that an investigation into a non-cognizable offence without an order of Magistrate is illegal and non-conformance to the provisions of Section 155(2) is a non-conformance of the procedure established by law within the meaning of Article 21 of the Constitution of India [*Subodh Singh Modak Vs. State*, 1974 Cri. LJ 185 (Calcutta) and

Sudarshan Vs. State of Karnataka, (1979) 2 Karn LJ 449].

(ix) In view of the aforesaid it has been submitted that even if assuming that the allegations make out an offence under Section 287 of Indian Penal Code, the impugned F.I.R. could not have been lodged. Submission of charge sheet by the Police and the consequent taking out cognizance by the Learned Magistrate by the impugned order dated 26.10.2007 would not in any manner take away the power of this Hon'ble Court under Section 482 of Cr.P.C. to quash the F.I.R. on the ground that it did not disclose commission of any cognizable offence and resultantly the cognizance order is also liable to be set aside. Reliance in this context is placed on the decision of the Hon'ble Supreme Court rendered in the case of Anand Kumar Mohata Vs. State (Government of NCT of Delhi) [2018 SCC Online 2447], para 16 to 18.

8. Re: point (c) it is submitted as under :

(i) As is evident from the fard beyan of the informant, no specific overt act or omission has been alleged against the petitioners and they have already been arrayed as an accused by merely stating that they being the Chairman and Manager are responsible for the accident / incident. The allegations are vague and sweeping in nature.

(ii) Admittedly, the Company i.e. Nicco Jubilee Park Limited has not been made an accused. Even the cognizance order does not show as to how the petitioners were responsible for the accident / incident. In absence of any specific allegation against the petitioners, they cannot be prosecuted only by virtue of holding some position in the Company.

(iii) It is now well settled that the penal code does not contain any provision for attracting vicarious liability on the part of Directors or officials of the Company. Statutes undisputedly must contain provision fixing such vicarious liability and even for the said purpose, it is obligatory on the part of the complainant / informant to make requisite allegations which would attract provisions constituting vicarious liability [Maksud Sayed Vs. State of Gujarat, (2008) 5 SCC 668, para-13].

(iv) The Hon'ble Supreme Court in the case of "Sharad Kumar Sanghi Vs. Sangita Rane" [(2015) 12 SCC 781, para-13] has observed that when the Company has not been arraigned as an accused, cognizance could not be taken.

(v) Viewed thus, it is submitted that the prosecution as against the petitioners in absence of the Company, is liable to be quashed and set aside.

9. Re: point (d) it is submitted as under :

(i) While exercising power under Section 482 Cr.P.C., the High Court has the competence and jurisdiction to look into documents which may not form part of the Complaint / F.I.R. / Police Paper, but, are admitted documents or are unimpeachable in nature. The petitioners have brought on record the plaint filed

by the complainant / informant upon which a civil suit being Money Suit No. 20 of 2007 has been instituted. The said suit has been brought in with a prayer for a decree of recovery of Rs.8,00,000/- as damages and Rs.7,00,000/- towards expenses for future medical treatment. It is based on the same accident / incident. Para-2 of the plaint narrates the reason for the injury received by the plaintiff / informant which reads as under: -

"2. That the plaintiff decided to take ride on "Moon Maker" Jhula and as soon as she entered the said Jhula, the operator negligently started the Jhula at great speed without any control resulting thereby a great jerk and the plaintiff was thrown out of the Jhula on the ground from a height of 15 feet causing serious head injuries to the plaintiff."

(ii) The variance in the narration of the accident / incident and the reason thereof, is writ large. This clearly demonstrates that the informant has abused the process of law by setting the criminal law in motion. There is no mention about non-availability of safety belts in the plaint.

(iii) The Hon'ble Supreme Court in the case of "All Cargo Movers (India) Pvt. Ltd. & Ors. Vs. Dhanesh Badarmal Jain & Anr." reported in [(2007) 14 SCC 776, para-16] opined that for the purposes of ascertaining whether the allegations even if given face value and taken to be correct in its entirety make out an offence or not, it is permissible for the Court to look into a plaint.

(iv) The power of this Hon'ble Court to quash proceedings on the ground of abuse of process of law, is beyond any cavil of doubt and needs no reiteration. Having regard to the varying and completely different stands in two different proceedings arising out of the same cause of action speaks volumes about the conduct of the informant and also indicates about the correctness of the allegation.

10. On the basis of the aforesaid, it is submitted that if the present proceedings are allowed to continue, then the same shall be an abuse of process of law and court and will result in miscarriage of justice.

Submissions of the counsel for the opposite party

11. Counsel appearing for the opposite party has opposed the prayer and has submitted that the arguments of the petitioners is devoid of any merits and hence fit to be rejected. He further submits that the points argued by the petitioners cannot be appreciated at the stage of cognizance.

Findings of this Court

12. After hearing the counsel for the parties and considering the materials on record, this Court finds that as per the prosecution story, the informant along with her husband and children went to Jubilee Park and also attended a ride "moon maker" which got broken and due to which they fell down and got injured. It has been specifically alleged in the First Information Report (F.I.R) that no

safety belt was on place in the said ride whereas on earlier occasion when they had taken a ride, the safety belt was there. It is also alleged that the incident had taken place due to negligence of the petitioners and that the owner of the ride are the (Chairman) Raina (petitioner no.1) , Manager Mohanti and Management of Jusco as well as one Sanjiv Bhan (petitioner no. 2) .

13. In the case of "P.B. Desai Vs. State of Maharashtra" [(2013) 15 SCC 481], relied upon by the learned counsel for the petitioners, the Hon'ble Supreme Court has elaborately dealt with the issue as to whether Section 338 of Indian Penal Code recognizes that the particular offence may be committed by omission and has held in para 21 that a perusal of section 338 IPC clearly demonstrates that before a person is held guilty of the offence the following ingredients need to be established:-

- (a) Causing grievous hurt to a person
- (b) Grievous hurt should be the result of an Act
- (c) Such act ought to have been rash and negligent
- (d) The intensity of commission of such an act ought to endanger human life or personal safety of others.

The Hon'ble Supreme Court in this judgement has held in para 28 to 31 that there may be various circumstances where Act may include omissions also. In para 41 to 46 of the said judgement the Hon'ble Supreme court has also laid down as to when the breach of duty to take care would attract civil and criminal liability. The relevant portion of the aforesaid judgment, for the purposes of the present case , is reproduced herein below:-

"28. Whether "act" includes "omission"? Though this aspect needs elaboration along with discussion with regard to other ingredients as these are inextricably mixed up and cannot be discussed in isolation and, therefore, we have proceeded in that manner at an appropriate stage. Here, we are narrating the legal position only. In this behalf, we may point out that there may be various circumstances where "act" would include "omission to act" as well. This is so recognized even in Sections 32, 33 and 36 IPC. These provisions are reproduced below:

"32. Words referring to acts include illegal omission.

- In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions.

33. 'Act', 'Omission'. - The word 'act' denotes as well a series of acts as a single act: the word 'omission' denotes as well a series of omissions as a single omission.

36. Effect caused partly by act and partly by omission - Wherever the causing of a certain effect, or an attempt to cause that effect, by an act or by an omission, is an offence, it is to be understood that the causing of that effect partly by an

act and partly by an omission is the same offence."

29. The legal understanding of omission is indispensable at this juncture. An omission is sometimes called a negative act, but this seems dangerous practice, for it too easily permits an omission to be substituted for an act without requiring the special requirement for omission liability such as legal duty and the physical capacity to perform the act. Criminal liability for an omission is also well accepted where the actor has a legal duty and the capacity to act. It is said that this rather fundamental exception to the act requirement is permitted because an actor's failure to perform a legal duty of which he is capable, satisfies the purposes of the act requirement or at least satisfies them as well as an act does. Specifically, these two special requirements for omission liability help to exclude from liability cases of fantasizing and irresolute intentions, important purposes of the act requirement.

30. However, a failure to act, by itself does nothing to screen out mere fantasies. It is the actor's failure to act in the light of his capacity to do so that suggests the actor's willingness to go beyond mere fantasizing and to have the harm or evil of the offence occur. Even then, however, the screening effect seems weak; "letting something happen" simply does not carry the same implication of resolute intention that is shown in causing something to happen by affirmative action. While an actor's failure to perform a legal duty provides some evidentiary support for the existence of an intention to have the harm or evil occur, the force of the implication is similar weak. Inaction often carries no implication of intention unless it is shown that the actor knows of his or her duty to act and the opportunity to do so.

31. Liability for an omission requires a legal duty to act; a moral duty to act is not sufficient. The duty may arise either from the offence definition itself or from some other provision of criminal or civil law. A duty arises from the former when an offence is defined in terms of omission. This is the situation where the legislature has made it an offence. A legal duty to act may also be created by a provision of either criminal or civil separate from the offence charge. For example, a duty under the Maharashtra Medical Council's Code of Ethics and the Maharashtra Medical Council Act, 1965.

32. Since there is no moral difference between (i) a positive act and (ii) an omission when a duty is established, it is to be borne in mind that in cases of omissions, the liability should be exceptional and needs to be adequately justified in each instance. Secondly, when it is imposed this should be done by clear statutory language. Verbs primarily denoting (and forbidding) active conduct should not be construed to include omissions except when the statute contains a genuine implication to this effect. Thirdly, maximum penalties applied to active wrongdoing should not automatically be transferred to corresponding omissions; penalties for omissions should be rethought in each case. Indeed, the Penal Code, 1860 does include explicitly the liability due to omissions. And even Indian courts have affirmed so. In *Latifkhan*, wherein it was held that the law imposes a

duty to act on a person, his illegal omission to act renders him liable to punishment. While dealing with the imposition of liability for omission, certain considerations are required to be kept in mind. Does Section 338 IPC recognize that the particular offence may be committed by omission? Some category of offences may, some may not; does it include medical profession? If the offence is capable of being committed by omission, who all were under a duty to act? Who owed the primary duty? What are the criteria for selecting the culprit? Where the definition of the crime requires proof that the actor caused a certain result, and can he be said to have caused that result by doing nothing? These questions cannot be completely separated and sometimes few or all three of them would arise in the same material which follows. Each of them, perhaps, also gives rise to yet another question: is the actor's conduct properly categorized as an omission or an act? Indeed Section 338 IPC does recognize unambiguously that the particular offence can be committed by omission. More so, the medical profession is included in it. The offence under Section 338 IPC is capable of being committed by omission.(emphasis supplied)

Breach of duty to take case: consequences

"41. If the patient has suffered because of negligent act/omission of the doctor, if undoubtedly gives right to the patient to sue the doctor for damages. This would be a civil liability of the doctor under the law tort and/or contract. This concept of negligence as a tort is explained in *Jacob Mathew v. State of Punjab*, in the following manner:

"10. The jurisprudential concept of negligence defines any precise definition. Eminent jurists and leading judgments have assigned various meanings to negligence. The concept as has been acceptable to Indian jurisprudential thought is well stated in *Law of Torts*, Ratanlal & Dhirajlal (24th Edn., 2002, edited by Justice G.P. Singh). It is stated (at pp. 441-42):

'Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property.....

The definition involves three constituents of negligence: (1) A legal duty to exercise due care on the part of the party complained of towards the party complaining the former's conduct within the scope of the duty; (2) breach of the said duty ; and (3) consequential damage. Cause of action for negligence arises only when damage occurs; for, damage is a necessary ingredient of this tort."

Criminal liability: When attracted

"44.....

45.....

46. The solution to the issue of punishing what is described loosely, and possibly inaccurately, as negligence is to make a clear distinction between negligence and recklessness and to reserve criminal punishment for the latter. If the conduct in question involves elements of recklessness, then it is punishable and should not be described as merely negligent. If, however, there is nothing to suggest that the actor was aware of the risk deliberately taken, then he is morally blameless and should face, at the most, a civil action for damages."

14. This Court further finds that the language of section 337 and 338 of Indian Penal Code are same with the only difference that section 337 deals with causing hurt and section 338 deals with causing grievous hurt.

15. Thus this Court is of the considered view that the same principles of interpretation would also be attracted for interpretation of section 337 of Indian Penal code as has been laid down for interpretation of section 338 of Indian penal code in the aforesaid judgement and accordingly, it is held that the offence under section 337 is also capable of being committed by omission.

16. The learned counsel for the petitioners has submitted that from perusal of the above judgment, it is evident that in order to attract the provisions of 337 and 338 of Indian Penal Code in the case of omission, the accused must have a legal duty to act and such legal duty must arise either from the offence definition or some other provision of criminal or civil law.

In other words, the liability under Section 337 or 338 of Indian Penal Code would be attracted only when there is a clear statutory language casting an obligation on the accused to do a particular act.

The learned counsel has further submitted that in the instant case neither the informant has alleged nor has the Police found that the petitioners were under any statutory obligation/duty to ensure that belts must be available on the ride or for that matter it was their duty to ensure proper maintenance of the ride / machine. It has also been submitted that to the best of the knowledge of the petitioners, there is no statute in force in India which fastens any liability qua operation and maintenance of rides in an amusement park upon the petitioners or on the office which the petitioners held at the relevant time.

17. This Court is of the considered view that the Hon'ble Supreme Court, while interpreting Section 338 vis-a-vis liability for an omission, has clearly held in para 31 that liability for an omission requires a legal duty and the duty may arise either from the offence definition itself or from some other provisions of criminal or civil law. This Court further finds that the aforesaid judgement nowhere provides that the legal duty must necessarily have to be provided in a statute. The said judgement deals with breach of duty to take care and its consequences from para 41 to 46 and also deals with the circumstances when it would attract a civil liability or criminal liability and has clearly held in para 44 and 45 as to when

the criminal liability would be attracted. This Court further finds that as per Section 287 of Indian Penal Code, there is a duty to guard against probable danger with respect to use of machinery and there is no dispute that the ride namely "moon maker" is a machinery. Therefore, even as per the Indian Penal Code, there is a legal duty imposed with respect to the use of machines. Accordingly, this Court rejects the argument of the petitioners that with respect to use of rides no legal duty has been prescribed by a statute. Accordingly, the aforesaid argument of the petitioners is hereby rejected. The ingredients of Section 287 of India Penal Code has been discussed elaborately in subsequent paragraphs of this judgement.

18. This Court further finds that as per Section 287 of Indian Penal Code , the basic ingredients of the offence are:-

- i. The accused did an act with a machinery that endangered or was likely to endanger, life or was likely to cause hurt or injury.
- ii. That such act was done with machine.
- iii. That such act was done rashly and negligently.

Or

- iv. That the accused had in his possession or under his care some machinery
- v. That he omitted to take such order therewith as was sufficient to guard against a probable danger to human life therefrom
- vi. That such omission was negligent or with knowledge of such probable danger.

19. Upon perusal of the provisions of section 287 of Indian Penal Code , this Court finds that in order to attract this section, the accused need not be the owner of the machinery, mere his possession or machinery being put under his care is sufficient to attract criminal liability under this section, if other ingredients are present. There is further no dispute that section 287 IPC, by definition includes an omission also, if other ingredients of the offence are attracted. The arguments of the petitioners that there is no allegation far less any cogent and admissible material to show that the petitioners were aware that the safety belts are not available (as alleged) and the existence of the risk involved in operating the ride without such safety belt and despite the same, the petitioners had chosen to permit the operation of the ride, cannot be appreciated by this Court at the stage of taking cognizance. Such points are required to be taken by the petitioners at appropriate stage of the proceedings before the learned court below.

20. The learned counsel for the petitioners has also submitted that admittedly, in the instant case, the accident / incident has taken place while the informant was on a ride (machine), which is operated by another person and accordingly, in a case involving a machine, resulting in hurt / grievous hurt, the same cannot form a subject matter of an offence under Section 337 and 338 of the Indian Penal

Code. Such offence is specifically covered by the special / specific provision of Section 287 of Indian Penal Code. He further submits that Section 287 IPC also covers negligent omission to take such order with any machinery in possession or under care of any person, as is sufficient to guard against any probable danger to human life from such machinery. Reliance in this context is placed on the principle expressed in the maxims *Generalia specialibus non derogant* and *Generalibus specialia derogant*. Osborn's Law Dictionary defines the former to mean "general things do not derogate from special things", whereas the latter has been explained to mean "special things derogate from general things".

21. With respect to the aforesaid submissions of the learned counsel for the petitioners, this Court is of the considered view that the provisions of Section 287 and Section 337/338 of Indian Penal Code operate in different fields. An offence under section 287 is punishable irrespective of any actual hurt and an offence under section 337/338 is punishable when there is any hurt/grievous hurt. This Court is of the considered view that an act or omission while dealing with machine causing hurt or grievous hurt is to be dealt with section 287 and section 337/338 of Indian Penal Code. Section 337/338 of Indian Penal Code in its application does not exclude hurt/ grievous hurt caused by machines. Accordingly, the aforesaid arguments of the petitioners that there is no applicability of sections 337/338 of Indian Penal Code, is also rejected at this stage. However it is observed that it is for the trial court to consider at appropriate stage as to whether any case under section 337/338 of Indian Penal Code has been made out or not.

22. The F.I.R was registered under Sections 287, 337 and 338 of the Indian Penal Code against the petitioners as well as against other accused. Upon investigation, charge-sheet was filed for alleged offence under Sections 287, 337 and 338 of Indian Penal Code against the petitioners only. The cognizance was taken under sections 287, 337 and 338 of the Indian Penal Code and the present case has been filed for quashing the entire criminal proceedings including order taking cognizance. The present petition was itself filed after cognizance was taken and the present case has not been filed for quashing the FIR, although it has been argued by the petitioners that no case is made out against the petitioners as per the allegations made in the FIR. There is no dispute that the offence under Section 287 Indian Penal Code is non-cognizable and the offence under Section 337 and 338 of the Indian Penal Code are cognizable. Admittedly, the FIR was registered under cognizable as well as under non-cognizable offence and the petitioners did not approach this Court for quashing of the FIR. The investigation of the offence continued for the alleged offence under sections 287, 337 and 338 of the Indian Penal Code and charge-sheet was submitted and cognizance was also taken under sections 287, 337 and 338 of the Indian Penal Code. It is at this stage the petitioners have approached this Court and have argued that very registration of the case under Sections 337 and 338 of Indian Penal Code is not sustainable and hence the police could not have investigated the offence under remaining section 287 of Indian Penal Code without the order of the Magistrate

as in such circumstances the offence would be non-cognizable. Accordingly, it has been also argued that the entire investigation of the alleged offence is vitiated and for this the petitioners have relied upon judgement passed by the Hon'ble Supreme Court in the case of Bhajan Lal (supra) para 102(4).

23. This Court finds that admittedly the case was registered both under cognizable and non-cognizable offence, therefore in view of section 155(4), the case is deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable. Considering the nature of allegations levelled in the present case, it cannot be said that the case could not have been registered under section 287 as well as sections 337/338 of Indian Penal code. This Court has already held above that these sections operate in different fields. In view of the aforesaid, this Court does not find any illegality in investigation of the case by police without any order from the Magistrate. The petitioner has approached this Court at a much later stage when investigation was over and cognizance was already taken under Sections 287, 337 and 338 of the Indian Penal Code. Even the petitioners were not aggrieved till the stage of order taking cognizance and accordingly, the petitioners did not challenge the FIR or the sections under which it was registered. In view of the aforesaid findings, this Court does not find any illegality with the investigation of the case by police.

24. Upon perusal of the petition filed before this Court, this Court finds that it has been stated in the main petition that the petitioner no.1 is the Managing Director of Tinsplate Company of India Limited as well as the Chairman of Nicco Jubilee Park Limited and the petitioner no.2 is the Manager-In-charge of the Nicco Jubilee Park Limited. The specific case of the petitioners as per the present petition is that the petitioners are not vicariously liable for any acts of the subordinates far less criminally, which has been specifically stated in para 12 of the main petition and a different argument has been advanced stating that the petitioners cannot be held liable vicariously for the offence committed by the company. Although, the petitioners have stated their status in the company namely Tinsplate Company of India Limited as well as Nicco Jubilee Park Limited, but there is no such foundational fact mentioned in the present petition that as to who was the owner of the ride involved in this case. As per the allegations made in the F.I.R, the owner of the ride was Raina (Chairman) (Petitioner No.1), Manager Mohanti and Management JUSCO and Sanjiv Bhan (Petitioner No.2). Further this Court finds that after investigation, charge sheet was submitted against the petitioners. From perusal of the records of this case, this Court finds that there is neither such pleadings nor any such material to suggest that the amusement park is owned and managed by company namely Nicco Jubilee Park Limited. Accordingly, the argument of the petitioners that the amusement park is owned and managed by the company namely Nicco Jubilee Park Limited is not borne out of records of the present case and cannot be appreciated at this stage. Even the case diary of the present case is not available before this Court for appreciation and considering if any such material has come up during investigation. This is over and above the fact that as per section 287 of Indian

Penal Code, the criminal liability is fastened upon any person who is in possession of the machinery or the machinery is put under his care and it has nothing to do with the ownership of the machinery. In this background, the argument of the petitioners that they are being criminally prosecuted only because they held the post of Chairman, Manager In-Charge respectively in the company at the relevant point of time, is rejected. The role and responsibilities of the petitioners is required to be examined on the basis of materials collected during investigation at appropriate stage.

25. The petitioners have also argued that the informant of the case has narrated a completely different story in the civil suit instituted by her arising out of the same incident, in as much as, the plaint in the civil suit gives a different story. This Court finds from perusal of the plaint in the civil suit that it also mentions about negligence on the part of the present petitioners in their duty to take appropriate care for the operation of the ride. Although there are certain inconsistencies in allegation made in the F.I.R and the plaint filed in the suit, those inconsistencies are minor inconsistencies and are not enough to quash the entire criminal proceedings against the petitioners. This Court further finds that inconsistencies in the version of the informant regarding the allegations made in the F.I.R and the civil suit, can be ironed out only at the stage of trial by putting appropriate questions to the informant of the case at the stage of his cross examination. Accordingly, the contention of the counsel for the petitioners that the present proceedings are to be quashed on account of alleged different story in the civil suit instituted by the informant arising out of same incident, is rejected at this stage.

26. As a cumulative effect of the aforesaid findings, all the four points raised by the petitioners are hereby rejected at this stage and the present petition is hereby dismissed. It will be open to the petitioners to raise the points as may be available to them under law at appropriate stage before the learned court below and dismissal of this case will not prejudice the case of either parties before the learned court below in any manner whatsoever.

27. Pending interlocutory applications, if any, are dismissed as not pressed.

28. Interim order, if any, stands vacated.

29. Let a copy of this order be immediately communicated to the learned court below.