

(1994) 11 KAR CK 0039
In the Karnataka High Court
Case No : Criminal Petition No. 1433 of 1990

Siddharth Kejriwal

APPELLANT

Vs

Employees' State Insurance Corporation

RESPONDENT

Date of Decision : 10-11-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 468, 482
Employees State Insurance Act, 1948 — Section 2 (17)

Citation : (1997) 90 CompCas 496

Hon'ble Judges : Venkataramana Rao, J

Bench : Single Bench

Advocate : K.G. Raghavan, for the Appellant; M. Papanna, for the Respondent

Judgement

Venkataraman, J.—This petition is filed by accused Nos. 1, 3, 5 and 6 in C.C. No. 189 of 1990 on the file of the Special Court (Economic Offences), Metropolitan Areas and District Court of Bangalore, u/s 482 of the Criminal Procedure Code, for quashing the proceedings initiated against them on the complaint of the respondent, the Regional Director of the Employees' State Insurance Corporation, for offences u/s 85(a) and (g) of the Employees' State Insurance Act, 1948 ("the Act", for short).

2. The respondent in the complaint, a copy of which is produced at annexure "D", has alleged that K.R. Mills at Mysore is a "factory" as defined u/s 2(12) of the Act, that the eight accused persons including the present petitioners are the principal employers of the said factory as defined in section 2(17) of the Act, that u/s 40(1) of the Act read with regulation 26 of the Employees State Insurance (General) Regulations, 1950, every principal employer of a factory covered under the Act is required to pay the contribution within 21 days following the last day of the calendar month in which the contribution falls due and submit the return of contribution in Form-6 within 30 days of the end of the contribution period to the E.S.I. Corporation, that the accused have failed to pay the contribution for the period from December, 1976 to March, 1978, July, 1978, to January, 1983, May,

1984, to July 1984, September, 1984, and November, 1984, in spite of reminders and have thus violated section 40 of the Act and are liable to be punished u/s 85(a) and (g) of the Act.

3. The magistrate has taken cognizance of the offence and issued summons to the accused persons.

4. Sri K.G. Raghavan, learned counsel for the petitioners, mainly urged two grounds for quashing the proceedings. The first ground urged by him is that the complaint was barred by time and as such the magistrate could not have taken cognizance of the offence. He based this plea regarding limitation on two grounds. He pointed out that section 86(3) of the Act, as it stood prior to its amendment by Act 29 of 1989 (hereinafter referred to as "the 1989 Amendment Act"), stipulated that no court shall take cognizance of any offence under the Act except on a complaint filed within six months of the date on which the offence is alleged to have been committed and contended that as the contribution in respect of each month has to be paid within 21st of every subsequent month and the return of each month has to be filed on or before 30th of the succeeding month, the offence in respect of each period is committed on the 21st in respect of non-payment of contribution and on 30th in respect of non-submission of returns of the succeeding month and the complaint had to be filed within six months from those dates. As the complaint in this case is filed on January 25, 1990, i.e., more than five years after the last period in respect of which contribution is alleged to have not been paid, he contends that the complaint was barred by time. Though section 86(3) has been amended in 1989 by omitting that portion which required the complaint to be filed within six months, according to Sri Raghavan, as the period for prosecuting the accused for the above offences had become barred by time even prior to the 1989 Amendment Act, the accused had acquired a right, and the amendment cannot revive the remedy which had become barred by time or take away the right which had accrued to the accused.

5. Another ground urged by Sri Raghavan is that u/s 468 of the Criminal Procedure Code, also the complaint is barred by time. Prior to the 1989 Amendment, the punishment prescribed for the offence u/s 85 was six months and after the 1989 Amendment, the punishment prescribed is three years. If it is to be held that the offence was committed before the 1989 Amendment and as such the punishment which had been prescribed earlier would be relevant, then the complaint had to be filed within one year. If the punishment prescribed after the 1989 Amendment is held to be relevant then the complaint had to be filed within three years. He, therefore, contended that in either case the complaint which is filed more than five years after the commission of the offence is barred by time and the court could not have taken cognizance of the offence. Section 86(3) of the Act, as it stood prior to the 1989 Amendment, read as hereunder :

"86. (3) No court shall take cognizance of any offence under this Act except on a complaint made in writing in respect thereof, (within six months of the date on which the offence is alleged to have been committed)."

6. By the 1989 Amendment, the words shown in the brackets have been omitted. The result is that after the 1989 Amendment, section 86(3) does not prescribe any time limit within which the court can take cognizance of the offence. Now, the general provision u/s 468 of the Criminal Procedure Code alone would be applicable.

7. Sri M. Papanna, learned counsel for the respondent, while seeking to contend that the law regarding limitation is a procedural law and that procedural laws generally operate retrospectively and as such section 86(3) as it stands now will have to be applied, strongly urged that in any event, the failure to pay the contribution under the Act is a continuing offence and as such question of limitation would not arise at all.

Before considering the rival contentions urged as above, I may refer to one aspect pertaining to the offence u/s 85(g) which is alleged in the complaint. Section 85 prescribes the punishment in respect of various contraventions. Section 85(a) deals with the failure to pay contribution which under the Act the accused is liable to pay. Clause (g) is a residuary clause and it prescribes punishment, if any person is guilty of any contravention of or non-compliance with any of the requirements of the Act or the Rules or the Regulations in respect of which no special penalty is provided. The failure to submit the monthly returns would come u/s 85(e). In the complaint there is no reference to the offence u/s 85(c) though in para. 5 there is a general averment as to when the principal employer has to submit the return of contribution. There is no specific allegation in the complaint that the accused have failed to submit the returns for any particular period. The specific allegation made in para. 6 of the complaint is only with regard to the failure to pay the contribution for the wage periods mentioned therein. As such there is no complaint against the accused persons for an offence regarding failure to submit monthly returns punishable u/s 85(e). As the failure to pay the contribution as required u/s 40 is punishable u/s 85(a), and as there is no allegation of any other contravention of either the Act or the Rules and Regulations, it is obvious that the reference to section 85(g) in the complaint is superfluous. Even if it is possible to infer that the respondent has alleged commission of offence with regard to non-submission of returns, it is patent that the complaint in respect of such offence would be barred by time u/s 468 of the Criminal Procedure Code. Sri Papanna did not seek to contend that even the offence regarding non-submission of returns would be continuing offence. He could also raise such a contention in view of the Decision of the Supreme Court in State of Bihar Vs. Deokaran Nenshi and Another, Further, on the material on record it cannot be said that the magistrate has taken cognizance of the offence u/s 85(e) of the Act. The main point to be considered in this case is whether the proceedings initiated against the petitioners for the offence u/s 85(a) have to be quashed.

8. With regard to the offence of non-payment of contribution though some arguments have been advanced on the question as to whether the 1989

Amendment can take away that right which has accrued to the accused on the ground of limitation, I feel it is unnecessary to go into that question in this case. Even if the 1989 Amendment is applicable to this case, the question whether the complaint is barred u/s 468 of the Criminal Procedure Code, will have to be examined. Section 472 of the Criminal Procedure Code provides that in the case of a continuing offence a fresh period of limitation shall begin to run at every moment of time during which the offence continues. If the offence is held to be a continuing offence then the complaint being barred by time either u/s 86(3) of the Act as it stood prior to the amendment or u/s 468 of the Criminal Procedure Code, would not arise. If the offence is held to be not a continuing offence, then the complaint would be barred u/s 468 of the Criminal Procedure Code, irrespective of the fact whether section 86(3) as amended by the 1989 Act has to be applied or the earlier provision has to be applied. Thus, it is seen that in either event it is not necessary to go into the question as to whether section 86(3), as it stood prior to the 1989 Amendment, has to be applied to the case or section 86(3) as it now stands has to be applied.

9. The main question that arises for consideration is as to whether the offence of non-payment of the contribution under the Act is a continuing offence. The expression "continuing offence" is not defined. The Supreme Court in *State of Bihar Vs. Deokaran Nenshi and Another*, has observed as hereunder (headnote) :

"A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and recurs, there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues, and, therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all."

10. In the above case, it was held that the offence regarding failure to submit a return within the particular time is committed once and for all and is not a continuing offence.

11. Sri Papanna has strongly relied on the decision in *Bhagirath Kanoria and Others Vs. State of M. P.*, to contend that the failure to pay the contribution under the Act is a continuing offence. According to him, though the above decision is with regard to failure to pay contribution under the Employees' Provident Funds Act, the same would be applicable even to a case under the Act as the latter Act is also a social legislation meant for the benefit of the employees.

12. In *Bhagirath Kanoria and Others Vs. State of M. P.*, the Supreme Court was

dealing with the question as to whether the failure of the employer to pay the contribution which is payable under the Employees Provident Funds Act is a continuing offence or not. The court has laid down the following principles which have to be followed while dealing with such questions (page 105 of 68 FJR) :

"The question whether a particular offence is a continuing offence must necessarily depend upon the language of the statute which creates that offence, the nature of the offence and, above all, the purpose which is intended to be achieved by constituting the particular act as an offence. Turning to the matters before us, the offence of which the appellants are charged is the failure to pay the employer's contribution before the due date. Considering the object and purpose of this provision, which is to ensure the welfare of workers, we find it impossible to hold that the offence is not of a continuing nature. The appellants were unquestionably liable to pay their contribution to the provident fund before the due date and it was within their power to pay it, as soon after the due date had expired as they willed. The late payment could not have absolved them of their original guilt but it would have snapped the recurrence. Each day that they failed to comply with the obligation to pay their contribution to the fund, they committed a fresh offence. It is putting an incredible premium on lack of concern for the welfare of workers to hold that the employer who has not paid his contribution or the contribution of the employees to the provident fund can successfully evade the penal consequences of his act by pleading the law of limitation. Such offences must be regarded as continuing offences, to which the law of limitation cannot apply."

13. Sri Raghavan contended that in the above case the Supreme Court itself has observed that the question whether a particular offence is a continuing offence must depend on the language of the statute, that there are many vital distinguishing features between the scheme of the Provident Funds Act and the scheme of the Act, that the provisions of the Act indicate that it is not intended to make the offence regarding non-payment of contribution a continuing offence. He first pointed out that under the Provident Funds Act if contributions are not paid it will directly affect the employees, whereas under the Act if the contributions are not paid the result would be that the employees do not get covered only during that period and that if at all it is the Corporation which will lose the amount. He next pointed out that while section 67 of the Act prescribes a period of limitation to approach the insurance court for recovery of the arrears of contribution, no such limitation is prescribed under the Provident Funds Act. Lastly, he pointed out that, while section 86(3), prior to the 1989 Amendment, had stipulated that the complaint had to be filed within six months of the date of commission of the offence, no such provision is made in the Provident Funds Act. He urged that in view of these distinguishing features, the decision of the Supreme Court in Bhagirath Kanoria and Others Vs. State of M. P., cannot be applied to the offence under the Act. He strenuously contended that in view of section 77 of the Act which stipulates that after a particular period the Corporation cannot claim the contribution, it is clear that the failure to pay the

contribution cannot be a continuing offence. 14. Sri Papanna, however, contended that, even under the Act no limitation is prescribed for recovery of the contribution due from the employer, that if the employer fails to submit returns the Corporation can u/s 45A determine the amount due, that the Corporation itself is empowered to recover the arrears due from the employers, that there would be no need for the Corporation to approach the insurance court u/s 77 for recovery of the contribution. He highlighted the fact that just like the Employees' Provident Funds Act, this Act is also a social legislation meant for the benefit of the workmen that the working of the Corporation depends on the contributions to be paid by the employers and that in view of the object of the enactment the offence of failure to pay the contribution must be deemed to continue till the contribution is paid.

15. At the outset, I must point out that in Bhagirath Kanoria and Others Vs. State of M. P., though the Supreme Court had indicated that the language of the statute which creates the offence and nature of the offence would have a bearing on the question whether the offence is a continuing offence or not, it is, however, made clear that the purpose which is intended to be achieved for constituting a particular act an offence is of primary importance. It may be noted that for the purpose of determining that the offence regarding non-payment of contribution is a continuing offence, the Supreme Court has not referred to any other provisions of the Employees' Provident Funds Act nor has it relied on the circumstances that no limitation is prescribed for recovery of provident fund contribution. We have to, therefore, primarily consider the purpose which is intended to be achieved by constituting the offence under the Act. The Supreme Court in AIR 1972 1935 (SC) after examining the provisions of the Act, has observed as hereunder (page 347 of 40 FJR) :

"An examination of the purpose and intendment of the Act and the scheme which it effectuates, leaves no doubt that it was enacted for the benefit of the employees and their dependants, in case of sickness, maternity and employment injury, as also to make provision for certain other matters... These provisions, in our view, unmistakably indicate that the whole scheme is dependent upon the contributions made by the employer not only with respect to the amounts payable by him but also in respect of those payable by the employee."

16. Even in Regional Director, Employees State Insurance Corporation Vs. Fibre Bangalore (P) Ltd., a Full Bench of this court has held that (page 489) : The Act is a piece of beneficial legislation and was enacted to effectuate a scheme providing for benefits to the employees and their dependants in cases of sickness, maternity and employment injury. After examining the general scheme of the Act in regard to various obligations imposed by and the rights to benefits accrued under the Act, the Full Bench has observed that the whole scheme is dependent upon the contributions made by the employer not only with respect to the amounts payable by him but also with respect to those payable by employees. Thus, it is seen that just as in the case of the Provident Funds Act,

the object of the Act also is to ensure the welfare of the workers. If the employers do not pay their contributions it will necessarily deprive the employees of many benefits and it would be impossible for the Corporation which depends upon the contributions from the employers to perform its functions. The very object of the Act would be defeated if the employers fail to pay the contributions as required under the statute. The contention of learned counsel for the petitioners that if the contributions are not paid it is only the Corporation which will be affected is untenable. It is actually the employees who would be affected by such default. The essence of the offence created under the Act is the non-payment of the contribution and the time when it should be paid is fixed only for the purpose of taking action after the time is over. So long as the contribution is not paid the offence continues. The Supreme Court in Bhagirath Kanoria and Others Vs. State of M. P., while referring to its earlier decision in State of Bihar Vs. Deokaran Nenshi and Another, has observed as hereunder (page 104 of 68 FJR) :

"The decision of this court in State of Bihar Vs. Deokaran Nenshi and Another, to the effect that failure to furnish returns before the due date is not a continuing offence must be confined to cases of failure to furnish returns. It cannot be extended to cases like those before us in which the contravention is not of a procedural or formal nature and goes against the very grain of the statute under consideration."

If we apply the above principle enunciated by the Supreme Court in Bhagirath Kanoria and Others Vs. State of M. P., it would follow that even the contravention of the provision in the Act relating to payment of contribution is of a substantial nature and considering the object intended to be achieved by the statute it has to be held that the offence is a continuing offence. It is not necessary to consider the other provisions of the Act to find out whether the offence in question is a continuing offence or not. However, as some arguments have been addressed with reference to other provisions, I will refer to the same.

18. Section 77 of the Act, prior to its 1989 Amendment, read as hereunder :

"77. Commencement of proceedings. - (1) The proceedings before an Employees' Insurance Court shall be commenced by application.

(1A) Every such application shall be made within a period of three years from the date on which the cause of action arose.

Explanation. - For the purpose of this sub-section -

(a) the cause of action in respect of a claim for benefit shall not be deemed to arise unless the insured person or in the case of dependants' benefit, the dependants of the insured person claims or claim that benefit in accordance with the regulations made in that behalf within a period of twelve months after the claim became due or within such further period as the Employees' Insurance Court may allow on grounds which appear to it to be reasonable;

(b) the cause of action in respect of a claim by the Corporation of recovering contributions from the principal employer or a claim by the principal employer for recovering contributions from an immediate employer shall not be deemed to arise till the date by which the evidence of contributions having been paid is due to be received by the Corporation under the regulations."

After the amendment, section 77(1) reads as herein :

"77. Commencement of proceedings. - (1) The proceedings before an Employees' Insurance Court shall be commenced by application.

(1A) Every such application shall be made within a period of three years from the date on which the cause of action arose.

Explanation. - For the purpose of this sub-section, -

(a) the cause of action in respect of a claim for the benefit shall not be deemed to arise unless the insured person or in the case of dependants' benefit, the dependants of the insured person claims or claim that benefit in accordance with the regulations made in that behalf within a period of 12 months after the claim became due or within such further period as the Employees' Insurance Court may allow on grounds which appear to it to be reasonable;

(b) the cause of action in respect of a claim by the Corporation for recovering contributions (including interest and damages) from the principal employer shall be deemed to have arisen on the date on which such claim is made by the Corporation for the first time :

Provided that no claim shall be made by the Corporation after five years of the period to which the claim relates;

(c) the cause of action in respect of a claim by the principal employer for recovering contributions from an immediate employer shall not be deemed to arise till the date by which the evidence of contributions having been paid is due to be received by the Corporation under the regulations."

19. It is no doubt true that u/s 77, a period of limitation is prescribed within which the Corporation has to apply to the insurance court with regard to its claim regarding contributions payable by the employer. But this does not mean that in all cases the Corporation has to approach the insurance court alone to recover the contribution. Section 45A empowers the Corporation itself to determine the amount of contribution payable when the employer does not file returns or where the inspector is prevented from exercising his functions and no limitation regarding the period for which such determination could be made is laid down. Section 45B lays down that any contribution payable under the Act may be recovered as arrears of land revenue. By the 1989 Amendment sections 45C to 45H have been included. u/s 45C a provision is made for effecting recovery of the arrears by attachment and sale of movable or immovable property or establishment of the principal or immediate employer. There is also provision for

arresting the employer and detaining him in prison. Section 45G prescribes the other modes of recovery. These provisions do not prescribe any limitation with regard to the period for which the arrears of contribution due from the employer could be recovered. As such merely because a period of limitation is prescribed where the Corporation wants to make a claim before the insurance court with regard to recovery of contributions which includes interest and damages, it cannot be said that the Corporation will have no right to recover the contributions by other means beyond a certain period. The Full Bench of this court in *Regional Director, Employees State Insurance Corporation Vs. Fibre Bangalore (P) Ltd.*, has laid down that where in cases to which the provisions of section 45A are attracted the Corporation by an order made in accordance with that section determines the amount of contributions payable and if that claim is disputed by the employer, it would not be necessary for the Corporation to seek a resolution of that dispute before the insurance court and that such a claim is recoverable as arrears of land revenue. It is only in cases where the Corporation approaches the insurance court that the question of limitation would arise. In the circumstances, the fact that section 77 stipulates that an application to the insurance court by the Corporation for recovery of contributions should be made within a particular period cannot be a reason to hold that the offence committed by non-payment of the contribution is not a continuing offence.

20. The fact that section 86(3) prior to the Amendment stipulated the period within which a complaint had to be filed cannot be of much help to find out whether the offence in question is a continuing offence. Section 86(3) is a general provision which applies to complaints in respect of offences and the applicability of that provision would again depend upon the question whether the offence is or is not a continuing offence. If the offence is a continuing offence then that period will have no significance. Thus it is seen that even if the other provisions of the Act are taken into account it cannot be concluded that the offence of non-payment of contribution is committed once and for all if it is not paid on or before the stipulated date or that the law laid down by the Supreme Court in *Bhagirath Kanoria's case* [1984] 68 FJR 98 : AIR 1984 SC 222 is not applicable to the offence under the Act.

21. Taking into consideration the object and purpose sought to be achieved by creating the offence u/s 85(a) as well as the nature of the offence and in the light of law laid down by the Supreme Court in *Bhagirath Kanoria's case* [1984] 68 FJR 98 : AIR 1984 SC 222 it has to be held that the offence u/s 85(a) is a continuing offence and the bar of limitation would not be applicable for complaints regarding that offence.

22. The next ground urged by Sri Raghavan for quashing the proceedings is that, admittedly, the factory is owned by a company, that the offence, if at all is, committed by the company, that the directors of the company, merely because they are directors, would not become the principal employers nor would they be vicariously liable for the offence committed by the company. He pointed out that

even if section 86A which is introduced by the 1989 Amendment, is applicable to the case, it is only those persons who at the time the offence was committed were in charge of and were responsible to the company for the conduct of the business, who could be vicariously liable and that as there is no averment in the complaint that the petitioners were in charge of and were responsible to the conduct of the business of the company, no offence is made out against the petitioners.

23. Sri Papanna contended that under the Act it is the liability of the principal employer to pay the contributions, that in the complaint it is averred that the accused are the principal employers of the factory, that the question as to how the accused are the principal employers will have to be decided only after evidence is adduced and that at this stage the proceedings cannot be quashed on the ground that it is not stated as to how the accused have been shown as the principal employers. According to him even in a case where the company commits an offence all the directors could be made liable and that is a matter which has to be investigated at a later stage.

24. u/s 40 of the Act it is the liability of the principal employer to pay the contribution. "Principal employer" is defined u/s 2(17) of the Act as hereunder :

"2(17) "principal employer" means -

(i) in a factory, the owner or occupier of the factory and includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named as the manager of the factory under the Factories Act, 1948 (63 of 1948), the person so named;

(ii) in any establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf or where no authority is so appointed, the head of the department;

(iii) in any other establishment, any person responsible for the supervision and control of the establishment."

"Occupier" is defined u/s 2(15) of the Act and as per that definition that expression shall have the meaning assigned to it in the Factories Act. Section 2(n) of the Factories Act defines "occupier" of a factory as hereunder :

"(n) "occupier" of a factory means the person who has ultimate control over the affairs of the factory :

Provided that -

(i) in the case of a firm or other association of individuals, any one of the individual partners or members thereof shall be deemed to be the occupier;

(ii) in the case of a company, any one of the directors shall be deemed to be the occupier;

(iii) in the case of a factory owned or controlled by the Central Government, or

any State Government, or any local authority, the person or persons appointed to manage the affairs of the factory by the Central Government, the State Government or the local authority, as the case may be, shall be deemed to be the occupier."

In the complaint in para 4, it is stated that the accused are the principal employers of the aforesaid factory as defined in clause (17) of section 2 of the Act.

It is undisputed that the factory was being run by a company. Section 86A which deals with offences by companies reads as hereunder :

"86A. Offences by companies. - (1) If the person committing an offence under this Act is a company, every person, who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly :

Provided that nothing contained in this sub-section shall render any person liable to any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

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

Explanation. - For the purposes of this section, -

(i) "company" means any body corporate and includes a firm and other association of individuals; and

(ii) "director" in relation to -

(a) a company, other than a firm, means the managing director or a whole-time director,

(b) a firm means a partner in the firm."

As the offence for which the complaint is lodged is held to be a continuing offence, section 86A would be applicable, though this provision is included by the 1989 Amendment. Even learned counsel for the petitioners relied on this provision to contend that the averments in the complaint do not disclose that the directors of the company would be vicariously liable for the offence committed by the company.

25. For contravention of section 40 either the owner of the factory or its occupier or managing agent of such owner or occupier and a person named as manager of

the factory under the Factories Act could be prosecuted. It must be remembered that the proceedings have just been initiated and the petitioners want the proceedings to be quashed u/s 482, Criminal Procedure Code. The Supreme Court has repeatedly laid down that it is only if the averments in the complaint, if accepted in toto, do not make out any offence, the proceedings have to be quashed u/s 482, Criminal Procedure Code. In *State of Haryana and others Vs. Ch. Bhajan Lal and others*, the Supreme Court has observed that the power u/s 482, Criminal Procedure Code, should be exercised sparingly and that too in rarest of rare cases. As per that decision one of the grounds on which the FIR or a complaint could be quashed is that the allegations made in the report or the complaint even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

26. Now we have to consider whether even if the averments in the complaint, that all the accused persons are the principal employers, is accepted in its face value, no offence can be said to have been made out against the petitioners.

27. It is undisputed that the factory was run by a company. As such the owner of the factory was the company. In that sense the company would be a principal employer. If the owner is sought to be prosecuted as the principal employer of the factory then it is the company which has to be prosecuted. Section 86A provides that where the offence is committed by the company then even others could be made vicariously liable for that offence. However to make others vicariously liable for that offence it will have to be, in the first instance, alleged that they were in charge of and were responsible for the conduct of the business of the company when the offence was committed. Without such an averment a complaint against other persons for the offence committed by the company cannot be maintained. In this connection, I may refer to the decision of the Supreme Court in *Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others*, That was a case where for an offence under the Prevention of Food Adulteration Act committed by a company, some directors and the manager of the company were prosecuted. In the complaint, the following averments had been made (page 70) :

"That accused-3 is the manager of accused-2 and accused-4 to 7 are the directors of accused-2 and as such they were in charge of and responsible for the conduct of business of accused-2 at the time of sampling."

27. In that case also the Supreme Court, while holding that proceedings against an accused in the initial stages can be quashed only if on the face of the complaint or the papers accompanying the same no offence is constituted, held that there was no clear averment in the complaint that the directors were really in charge of the manufacture and responsible for the conduct of the business and that the words "as such" found in the above portion of the complaint indicate that the complaint has merely presumed that the directors of the company must be guilty because they are holding a particular office. Though the Supreme Court held that so far as the manager was concerned from the very nature of his duties

it can be safely inferred that he would be vicariously liable for the offence, so far as the directors were concerned, the Supreme Court held that there was not even a whisper or a shred of evidence to show, apart from the presumption drawn by the complainant, that there was any act committed by the directors from which a reasonable inference can be drawn that they could also be vicariously liable. The Supreme Court upheld the order of the High Court quashing the proceedings against the directors, though it held that the proceedings could not be quashed against the manager.

28. In another connected case *Municipal Corporation of Delhi Vs. Purshotam Dass Jhunjunwala and Others*, which was heard by the Supreme Court along with the above case, there was an averment in the complaint as hereunder :

"That accused, Ram Kishan Bajaj, is the chairman, accused, R.P. Neyatia, is the managing director, and accused 7 to 12 are the directors of the Hindustan Sugar Mills Ltd. and were in charge of and responsible to it for the conduct of its business at the time of commission of offence."

29. The Supreme Court held that in view of the above averment it cannot be said that the complaint is fake or that it does not implicate respondents Nos. 1 to 11, and that as to what would be the evidence against the respondents is not a matter to be considered at that stage and would have to be proved at the trial.

30. From the above authorities, it is clear that where the company has committed the offence, if others are to be made vicariously liable, there must be some material in the complaint to indicate that such others were in charge of and responsible to the company for the conduct of the business. In the present case, if it is to be taken that the owner being the principal employer, is sought to be prosecuted then the company and such others who were in charge of and responsible to the company for the conduct of the business at the time of the commission had to be prosecuted by making the necessary averments in the complaint. Even if the company is not prosecuted there is no bar for the other persons who are vicariously liable being prosecuted. In the present case, so far as the first petitioner is concerned, he is described as the managing director of K.R. Mills in the complaint. It is seen that in *Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others*, the Supreme Court has held that the description of one of the accused as manager is sufficient to indicate that he was in charge and responsible for the conduct of the business and that the proceedings cannot be quashed against him. In *T.J. Stephen and Others Vs. M/s. Parle Bottling Co. (P) Ltd. and Others*, a company and the managing director were prosecuted for an offence under the Imports and Exports (Control) Act. It was contended that the offence was committed by the company and that there were no allegations against the managing director. The Supreme Court repelled that argument by holding that the company cannot act by itself and it has to act through someone; that the managing director of the company *prima facie* would be in charge of and responsible for the conduct of the business. Under the Companies Act, the managing director is entrusted with substantial powers of management. In view

of the description of the first petitioner as managing director coupled with the averment that the accused are the principal employers, it cannot be said that no case is made out so far as the first petitioner is concerned, even if the company being the owner has committed the offence and he is sought to be prosecuted by virtue of section 86A. However, so far as the other petitioners are concerned, if the complaint is taken to be against the owner as the principal employer, then in the absence of any averment that the other directors were in charge of and responsible for the conduct of the business it cannot be said that they would be vicariously liable for the offence committed by the company.

31. Under the definition of principal employer even an occupier would be liable to pay the contribution. But if we see the definition of "occupier" with reference to the definition in the Factories Act the occupier would be the person who has ultimate control over the affairs of the factory and in the case of a company any one of the directors shall be deemed to be the occupier. In *W.S. Industries (India) Ltd. and another Vs. The Inspector of Factories and others*, this court dealing with the definition of occupier as found in section 2(n) has held as hereunder (page 145 of 77 FJR) :

"The contention raised on behalf of the respondents that, in the light of the amendment that has been made, a company has got to nominate only one of the directors or partners, or an individual of an association of persons as an occupier, therefore, cannot be accepted. This position becomes clear if the realities are taken into consideration. In the case of a partnership, on many an occasion there can be sleeping partners who merely are so but do not participate in the affairs of the concern. So also, in the case of a company, several financial institutions nominate directors who may have contributed their capital or advanced loans for the purpose of running the business of the company. In such cases those directors or partners cannot be held to be responsible in running the factory for they only know matters relating to finance and not those matters dealt with in the Act in question. It cannot be expected that certain professional men who are nominated on the board for their skill in any specialised field can be taken to be in charge of the factory by reason of the definition. The proviso does not say that the nominated partner of a firm or that the nominated director of a company would be the occupier. The fact that the definition says that in the case of a firm or association of individuals any one of the individual partners or members thereof or a director in the case of a company shall be deemed to be the occupier gives no choice either to the firm or to the company. But the main clause provides that the occupier shall be one who has ultimate control of the affairs of the company. This clause read with the operative provisions of the Act makes it clear that the occupier of a factory could be a person nominated by the board or by the firm notwithstanding the fact that such a partner or director could also be liable and the liability in respect of the operative provisions in respect of such director or partner will have to be established."

32. Thus, if an occupier of the factory is to be prosecuted as the principal

employer then it is only the director nominated for this purpose or the person in ultimate control over the affairs of the factory who can be prosecuted. Even for such a case section 86A would be applicable.

33. Sri Papanna strongly relied on the decision in *Srikanta Datta Narasimharaja Wodiyar Vs. Enforcement Officer, Mysore*, in support of his contention that a director of a company can be prosecuted. That was a case, where an offence under the Employees' Provident Funds and Miscellaneous Provisions Act had been committed by a company. The appellant was one of the directors of the company who was prosecuted along with others. He contended that he was merely a director of the company, that he was neither in charge of the company nor was responsible to comply with the provisions of the Act and that as such the complaint against him was to be quashed. It was also contended that no specific averments were made in the complaint making him responsible for the management of the factory or the liability to comply with the Act and the schemes. In that case in the complaint it was specifically stated that accused Nos. 2 to 6 including the appellant were the persons in charge of the said establishment and were responsible for the conduct of its business. Further, form No. 5A which was produced in the case clearly indicated that the appellant was one of the persons who was in charge of and responsible for the conduct of the business of the establishment. It is on the basis of those facts the Supreme Court held that a director of the private company who is neither an occupier nor a manager can be prosecuted u/s 14A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, for violation of the Provident Fund Schemes. I do not see how this decision can be of any help to the respondent.

34. Sri Papanna next relied on the decision in *Shivnarayan Laxminarayan Joshi and Others Vs. State of Maharashtra*, to contend that a director of a company is in the position of a trustee and he would be liable for an offence committed by the company. That was a case where a director of the company had been convicted of the offence u/s 409 of the Indian Penal Code, and under sections 120B and 477A of the Indian Penal Code. A contention was raised that substitution of one chose in action for another will not amount to breach of trust or conversion to his own use by the accused. Dealing with that contention the Supreme Court held that a director is not only an agent but is in the position of trustee and that a director being a trustee of the assets which have come into his hands, he has dominion and control over the same. That decision has no application at all to the point at issue. Section 86A deals with the case of vicarious liability of others including the directors when the offence is committed by a company. As such to make out that the directors have committed the offence the complaint has to come within the ambit of section 86A.

35. In *A.P. Jain v. C.N. Jothwani* [1979] 34 FLR 386 which was also relied on by Sri Papanna, the Gujarat High Court has held that even directors can in a given case fall within the description of principal employer and that in any view of the matter it is not considered right in principle to examine this question at the

threshold of the matter. Even in *Arup Kumar Pal Chaudhury v. Satyesh Chandra Bagchi* [1980] 57 FJR 38 the Calcutta High Court has held that the expression "principal employer" as defined in section 2(17)(i) of the Employees' State Insurance Act is wide enough to make the director a principal employer. In that case the three managing directors of the company have been prosecuted for an offence under the E.S.I. Act. In that case also there was no averment that directors were responsible for the supervision and control of the factory or that they were in actual possession of contribution cards. In *Mahalderam Tea Estate (Pvt.) Ltd. v. D.N. Prodhan* [1978] 52 FJR 392 (Cal) : [1978] Lab IC 898, in the complaint filed before the court, apart from the statement that the accused were directors of the company and hence responsible for the conduct of its business and management, there was further material from which the Magistrate could satisfy that the accused took some part in the running of the business of the company, The Calcutta High Court has held in the absence of such averments the cognizance taken by the Magistrate against the accused was bad in law. That was a case where the complaint was in respect of an offence under the Provident Funds Act. Again, in *K.N. Genda v. State* [1982] Lab IC 1777, the accused was prosecuted, for failure to pay the employer's contribution to the E.S.I. Corporation and he committed breach of trust. In the complaint, it was alleged that the accused were the principal employers of Calco Engineering Works. Relying on an earlier decision of that court, the Calcutta High Court held that the averment was not sufficient to connect the accused with the alleged offence and that the proceedings were liable to be quashed. In *Sham Sunder and Others Vs. State of Haryana*, the accused who were partners of the firm were prosecuted for an offence committed by the firm under the Essential Commodities Act. After pointing out that there is no vicarious liability in criminal law unless the statute takes that also within its fold, the Supreme Court has recorded a note of caution while prosecuting persons for the offence committed by a firm. That note of caution is as hereunder :

"It would be a travesty of justice to prosecute all partners and ask them to prove under the proviso to sub-section (1) of section 10 that the offence was committed without their knowledge. The obligation for the accused to prove under the proviso that the offence took place without his knowledge or that he exercised all due diligence to prevent such offence arises only when the prosecution establishes that the requisite condition mentioned in sub-section (1) is established. The requisite condition is that the partner was responsible for carrying on the business and was during the relevant time in charge of the business. In the absence of any such proof, no partner could be convicted."

36. It is no doubt true that in the above case the matter had gone to the Supreme Court after trial. But the note of caution would also be applicable while entertaining prosecution against directors of a company or partners of a company where there is not even an allegation that they were in charge of and responsible for the conduct of the business to the company or firm.

37. In view of the decision of the Supreme Court in *Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others*, and in the light of section 86(a) of the Act, which has been introduced by the 1989 Amendment, it follows that when the offence is by the company, to make a director liable the averments in the complaint or the documents produced along with the complaint must prima facie indicate that such director was in charge of and responsible for the conduct of the business to the company. If there is nothing on record to prima facie indicate that a director was in charge of and responsible for the conduct of the business to the company, then it amounts nondisclosure of any offence against such director and process cannot be issued against him for the offence committed by the company, only on the ground that he is a director of the company.

38. In the circumstances of this case, as the factory was owned and run by the company and as petitioners Nos. 2 to 4 and 5 to 8 are only directors of the company, in order to make them vicariously liable for the offence committed by the company, there should have been some indication in the complaint that they were in charge of and responsible for the conduct of the business to the company. The respondent has not produced any other material along with the complaint which gives such an indication. All the directors as such cannot automatically become "principal employers" when the factory belongs to and is run by a company. The complaint or other material produced along with the complaint must disclose how the directors of the company would be liable in such a case. Except against the first petitioner, who is the managing director of the company and who in that capacity could at this stage be deemed to be in charge of and responsible for the conduct of the business, in the absence of any averment in the complaint or any other material on record at this stage to indicate that accused were in charge of and responsible for the conduct of the business of the company, the other accused who are mere directors cannot be prosecuted. It would be an abuse of process of the court to allow prosecution of petitioners Nos. 2 to 4 in the light of the averments made in the complaint. Hence, except as against the first petitioner the proceedings against the other petitioners require to be quashed.

39. For the above reasons this petition is allowed in part quashing the proceedings in C.C. No. 189 of 1990 against accused Nos. 2 to 8. The trial court shall proceed with the complaint only against the first petitioner.