(2015) 02 RAJ CK 0293

In the Rajasthan High Court

Case No : Criminal Misc. Petition No. 1577 of 2006

Union of India — APPELLANT

Vs

Deepak Jatia and Others — RESPONDENT

Date of Decision : 19-02-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 482
Factories Act, 1948 — Section 60, 71, 71(1)
Mines Act, 1952 — Section 17, 18, 18(5), 22, 22A
Penal Code, 1860 (IPC) — Section 304A

Citation : (2015) 3 RLW 2346

Hon'ble Judges : M.N. Bhandari, J

Bench : Single Bench

Advocate : R.D. Rastogi, Addl. Solicitor General of India and Ashish Tiwari, for the Appellant; Mahendra Singh, Advocates for the Respondent

Final Decision : Allowed

Judgement

M.N. Bhandari, J—By this criminal misc. petition, a challenge is made to the order dated 5th May, 2006, whereby the revision petition preferred by the non-petitioners was accepted. A complaint was filed for violation of various provisions of the Mines Act, 1952 (for short "Act of 1952") and Rules and Regulations made there under. On filing of complaint, cognizance of offence was taken against all the accused. A revision petition was then filed on behalf of three accused and has been accepted. It was precisely on the ground that the complaint was filed against the owner and the agents, whereas if violation of any provision of the Act and the Rules was made, the Manager and others responsible officers can be prosecuted. The order of cognizance of offence against three revision petitioners was thus quashed.

2. Learned counsel for the petitioner-Union of India submits that the impugned order has been passed in ignorance of Sections 18, 72(c) and 76 of the Act of 1952. The Court below ignored the duties and responsibilities of the owners/ agents and managers, as provided under Section 18 of the Act of 1952.

3. A specific reference of Section 18(5) of the Act of 1952 was given to show as to who would be responsible in case of contravention of provisions of the Act, Rules, Regulations, Bye-laws and the orders issued there under.

4. As per Section 18 of the Act of 1952, the owner and the agents apart from the managers can be held responsible. Section 76 of the Act of 1952 provides about owner in certain cases. As per the provision aforesaid, in case of company, all or any of the Directors can be considered to be owners. The proviso, however, makes a reference of owner in case a notice in writing is given to Chief Inspector, nominating the Directors or Managers to carry out the provision of the Act and the Rules made there under. In that case, they would be responsible for any of the violation of the provision of the Act and Rules. In the instant case, the provision aforesaid was ignored by the Court below while recording finding in favour of the non-petitioners. The order for taking cognizance of offence against them was quashed mainly on the ground that they are the owners and the Directors of the company, thus not responsible for day to day business of the company. The Court below was otherwise influenced in the manner accident took place where an employee died. It was in ignorance of the complaint where not only incidence of death out of accident was mentioned but thereupon, violation of various provisions of the Act of 1952 and Rules have been referred, which came in the notice of the officials while causing inspection of mines. It was on an accident between two dumpers where one driver died. The Court below considered the issue of accident though complaint has disclosed other violations also. The impugned order was thus passed without application of mind.

5. A reference of Section 72(c) of the Act of 1952 was given to show special provision on contravention of law with dangerous results. The complaint was filed for violation of provision of the Act and Rules, which ultimately resulted in dangerous results. In absence of proper safety measures, which includes Rules for traffic, accident took place resulting in death of one driver. In view of above and looking to the overall facts, the Revisional Court should not have caused interference in the order for taking cognizance of offence and, that too, at the stage when only prima facie case is to be seen. A prayer is accordingly made to quash the impugned order passed by the Revisional Court.

6. A reference of judgment of Hon''ble Apex Court so as of this Court has been given to support the arguments.

7. In the case of Dinesh B. Patel and Others Vs. State of Gujarat and Another, (2011) 111 CLT 290 : (2010) 10 SCALE 103 : (2010) 11 SCC 125 : (2011) 1 SCC(Cri) 147 : (2010) 10 SCR 319 : (2010) AIRSCW 6923 : (2011) AIRSCW 2475 : (2010) AIRSCW 5899 , the issue regarding liability of Director was decided holding them to be responsible and liable for the offence under the Drugs and Cosmetics Act, 1940.

8. A reference of judgment of Hon''ble Apex Court in the case of State of Haryana Vs. Brij Lal Mittal and Others, AIR 1998 SC 2327 : (1998) CriLJ 3287 :

(1998) 2 Crimes 295 : (1998) 3 JT 584 : (1998) 3 SCALE 383 : (1998) 5 SCC 343 : (1998) 3 SCR 104 : (1998) AIRSCW 2240 : (1998) 4 Supreme 364 was also given.

9. In the case of R.C. Bahree and Others Vs. State (Government of India) and Another, (1990) 1 WLN 554 , similar issue was considered and decided by this Court.

10. A reference of Section 77 of the Act of 1952 was also given to focus as to who can be exempted despite being owners, agents or managers.

11. Per contra, learned counsel for the non-petitioner Nos. 1 to 3 inter alia raised objections regarding maintainability of the complaint.

12. It is submitted that due to collusion of two dumpers, driver of one dumper died resulted in FIR for offence under Section 304A of IPC. After investigation, it was found that Kamal Hassan - accused No. 5, was not the driver of the dumper. Once, the FIR in respect of same incident was registered followed by and investigation and charge sheet, the complaint for the same incidence was not maintainable, thus it should have been quashed on the aforesaid ground alone.

13. It is further stated that out of three accused before this Court, two accused have been named as witnesses from prosecution side. As accused cannot be made witness against himself and if, he is shown to be witness, cannot be an accused. It is settled law that accused cannot be asked to depose against himself. In the aforesaid premise also, the complaint deserves to be quashed.

14. A reference of complaint filed by the non-petitioners has been given. It is to demonstrate that what was the incidence and the offences thereupon. A specific reference of Section 69 of the Act of 1952 has been given to show violation of the said provision in ignorance of the complaint where one of the officers was named as Manager. Section 69 of the Act of 1952 is violated on a failure to appoint the manager. When the complaint itself discloses one of the person to be manager of the company. Section 69 of the Act of 1952 is not violated by the company.

15. A further argument has been made by referring Sec. 68 of the Act of 1952 to show for specific responsibility and liability on the officer referred therein. It does not exists in Sec. 69, 72A and 72C of the Act of 1952. In the event of violation of Sec. 72A and 72C of the Act of 1952, the responsibility can be fixed on a person, who is responsible for contravention of the provision and not on the owner and the agents. The distinction could not be made between various provisions of Chapter IX of the Act of 1952, while filing complaint. In view of above, the Revisional Court has rightly quashed the order taking cognizance of offence against those who are not concerned to the accident. In view of above, the order passed by the Revisional Court be affirmed.

16. It is also stated that Section 76 of the Act of 1952 further strengthen the case. The Manager has been made as an accused, thus proceedings should not

be allowed against the President and other officer of the company. The complainant cannot revert back to say that even if the manager has been named in the complaint, the responsibility would still remain on the owner. The nomination of Manager as per Section 76 of the Act of 1952 exists, thus proceedings against others should not be permitted.

17. A reference of judgment of Hon''ble Apex Court in the case of Aneeta Hada Vs. Godfather Travels and Tours Pvt. Ltd., AIR 2012 SC 2795 : (2012) 2 BC 638 : (2012) 108 CLA 480 : (2012) 172 CompCas 76 : (2012) 2 CompLJ 433 : (2012) CriLJ 2525 : (2012) 5 CTC 101 : (2012) 2 JCC 113 : (2012) 2 RCR(Criminal) 854 : (2012) 4 SCALE 644 : (2012) 5 SCC 661 : (2012) 113 SCL 564 : (2012) AIRSCW 2693 : (2012) 3 Supreme 416 has been given.

18. Therein, the issue as to whether the complaint can proceed in absence of company was decided. The issue was decided in reference to Negotiable Instruments Act, 1881 (for short "NI Act") and Information Technology Act, 2000 (for short "Act of 2000"). In para Nos. 59 and 64 of the said judgment, it was held that Directors of the company would not be liable. The judgment aforesaid applies to the facts of this case.

19. Lastly, the recent judgment of Hon''ble Apex Court in the case of G.N. Verma Vs. State of Jharkhand and Another, (2014) AIRSCW 4687 : (2014) 7 JT 373 : (2014) 3 SCALE 444 : (2014) 4 SCC 282 , has been referred. The issue therein was considered and decided in reference to same provision, as has been relied by the learned counsel for the petitioner herein. A prayer is accordingly made to dismiss the petition filed by the petitioner under Section 482 of Cr.P.C.

20. I have considered the rival submissions made by learned counsel for the parties and scanned the matter carefully.

21. On a complaint against the non-petitioners apart from others, an order for cognizance of offence was passed. The said order was challenged by the non-petitioners through a revision petition. It was allowed. The order of cognizance against the non-petitioners was quashed in reference to the incident and after considering that they are the owners and the Directors, thus were not responsible for day to day business of the company. It was after considering that a Managers were appointed after dividing the mine is six blocks. The aforesaid fact has been mentioned and is relevant in reference to Section 76 of the Act of 1952. It would be elaborately discussed in later part of this judgment.

22. Before dealing with issue as to whether complaint followed by the order of cognizance would be maintainable against the owner and the Directors of the company. It would be relevant to discuss certain objections raised by learned counsel for the accused-non-petitioners herein, on the maintainability.

23. The first issue has been raised in reference to FIR lodged for offence under Section 304A of IPC for the same incidence. Therein, after investigation, the charge sheet was filed. Mr. Kamal Hassan - accused No. 5 was not found to be

driver of the dumper.

24. The argument is that after lodging the FIR arising out of same incidence, complaint was not maintainable.

25. To appreciate the argument, I have gone through the complaint, a copy of which was supplied during course of the arguments. The complaint was lodged not only in reference to the accident but finding violation of various provisions of the Act of 1952, Rules & Regulations made there under. The FIR was registered for offence under Section 304A of IPC and it has nothing to do with violation of various provisions of the Act of 1952 and Rules made there under. The complaint for offence under the Act of 1952 can be filed by the competent authority and not by the Police. In view of above, the complaint cannot be quashed for the reason that FIR was separately registered arising out of same incidence in ignorance of the offence disclosed therein. The first objection raised by learned counsel for the petitioner, thus cannot be accepted.

26. Second objection is in reference to the complaint where the accused has been shown to be witness.

27. It is, no doubt true that accused cannot be asked to make statements against himself but perusal of the impugned order does not show that aforesaid issue was raised. Learned counsel for the petitioners, however, clarified that even if the accused has been shown in the calender of witnesses, option still lies with the prosecution to drop him as a witness and would be dropped.

28. In my opinion, when the issue aforesaid was not raised by the non-petitioners before the Revisional Court, it cannot be allowed to be taken up by them in a petition preferred by the Union of India. The petition has not been filed by the non-petitioners. Accordingly, the second ground cannot be accepted in view of the above and as the accused would not be asked to appear as prosecution witness, as stated by the counsel for the petitioner complainant.

29. The main issue now comes as to whether the non-petition Nos. 1 to 3 can be subjected to complaint despite availability of Manager as per Section 76 of the Act of 1952. The issue aforesaid would be discussed along with other issues in reference to Sections 18, 69, 72A, 72C, 76, & 77 of the Act of 1952. For ready reference, the provisions aforesaid are quoted hereunder:

"18. Duties and responsibilities of owners, agents and managers:- (1) the owner and agent of every mine shall each be responsible for making financial and other provisions and for taking such other steps as may be necessary for compliance with the provisions of this Act and the regulations, rules, bye-laws and orders made thereunder.

(2) The responsibility in respect of matters provided for in the rules made under clauses (d), (e) and (p) of section 58 shall be exclusively carried out by the owner and agent of the mine and by such person (other than the manager) whom the owner or agent may appoint for securing compliance with the

aforesaid provisions.

(3) If the carrying out of any instructions given under sub-section (2) or given otherwise than through the manager under sub-section (3) of section 17 results in the contravention of the provisions of this Act or of the regulations, rules, bye-laws or orders made thereunder, every person giving such instructions shall also be liable for the contravention of the provision concerned.

(4) Subject to the provisions of sub-sections (1), (2) and (3) the owner, agent and manager of every mine shall each be responsible to see that all operations carried on in connection with the mine are conducted in accordance with the provisions of this Act and of the regulations, rules, bye-laws and orders made thereunder.

(5) In the event of any contravention by any person whosoever of any of the provisions of this Act or of the regulations; rules, bye-laws or orders made thereunder except those which specifically require any person to do any act or thing, or prohibit any person from doing an act or thing, besides the person who contravenes, each of the following persons shall also be deemed to be guilty of such contravention unless he proves that he had used due diligence to secure compliance with the provisions and had taken reasonable means to prevent such contravention:

(i) the official or officials appointed to perform duties of supervision in respect of the provisions contravened;

(ii) the manager of the mine;

(iii) the owner and agent of the mine;

(iv) the person appointed, if any, to carry out the responsibility under sub-section (2).

Provided that any of the persons aforesaid may not be proceeded against if it appears on enquiry and investigation that he is not prima facieliable.

(6) It shall not be a defence in any proceedings brought against the owner or agent of a mine under this section that the manager and other official have been appointed in accordance with the provisions of this Act or that a person to carry the responsibility under sub-section (2) has been appointed.

Section 69:

69. Failure to appoint manager-Whoever, in contravention of the provisions of Section 17, fails to appoint a manager shall be punishable with imprisonment for a term which may extend to three months or with fine which may extend to (two thousand and five hundred) rupees, or both.

Section 72A:

72A. Special provision for contravention of certain regulations-Whoever contravenes any provision of any regulations or of any bye-law or any order made thereunder, relating to matters specified in clauses (d), (l), (m), (n), (o), (p), (r), (s) and (u) of Section 7 shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to two thousand rupees or with both.

Section 72C:

72C. Special provision for contravention of law with dangerous results-(1) Whoever contravenes any provision of the Act or of regulation, rule or bye-law or of any order made under (1A) or sub-sec. (2) of section (3) of section 22 for under sub-sec. (2) of Sec. 22A shall be punishable-(a) If such contravention results in loss of life, with imprisonment which may extend to two years, or with fine which may extend to five thousand rupees, or with both, or (b) If such contravention results in serious bodily injury with imprisonment which may extend to one years, or with fine which may extend to three thousand rupees, or with both; or (c) If such contravention otherwise causes injury or danger to persons employed in the mine or other persons in or about the mine, with imprisonment which may extend to three months or with fine which may extend to one thousand rupees, or with both. Provided that in the absence of special and adequate reasons to the contrary to be recorded in writing in the judgment of the court, such fine, in the case of a contravention referred to in clause (a), shall not be less than three thousand rupees. (2) Where a person having been convicted under this section is again convicted thereunder, shall be punishable with double the punishment provided by sub-sec. (1). (3) Any court imposing or confirming in appeal, revision or otherwise a sentence of fine passed under this section may, when passing judgment, order the whole or any part of the fine recovered to be paid as compensation to the person injured or, in the case of his death, to his legal representative; Provided that if the fine is imposed in a case which is subject to appeal no such payment shall be made before the period allowed for presenting the appeal has elapsed of, if an appeal has been presented, before the decision of the appeal.

Section 76:

76. Determination of owner in certain cases-Where the owner of a mine is firm or other association of individuals, all, or any of the partners or members thereof or where the owner of a mine is a company; all or any of the directors thereof where the owner of a mine is a Government or any local authority, as the case may be, to manage the affair of the mine, may be prosecuted and punished under this Act for any offence for which the owner of a mine is punishable:

Provided that where a firm, association or company has given notice in writing to the Chief Inspector that it has nominated-(a) in the case of a firm, any of its partners or managers: (b) in the case of an association, any of its members or managers; (c) in the case of a company any of its directions or managers. Who is resident in each case in any place to which this act extends and who is in each case either in fact in charge of the management or holds the largest number of shares in such firm, association or company, to assume the responsibility of the owner or the mine for the purposes of this Act, such partner, member, director or manager, as the case may be shall, so long as he continues to so reside and be in charge or hold the largest number of share as aforesaid, be deemed to be the owner of the purposes of this Act unless a notice in writing canceling his nomination or stating that he has ceased to be a partner, member, director or manager as the case may be, is received by the Chief Inspector. Explanation:- Where firm, association or company has different establishment or branches or different units establishment or branch, different persons may be nominated under this proviso in relation to different establishment or branches or units and the person so nominated shall, with respect only to the establishment, branch or unit in relation to which he has been nominated, deemed to be the owner of the mine.

Section 77:

77. Exemption of owner, agent or manager in certain cases.-Where the owner, agent or manager of a mine, accused of an offence under this Act, alleges that another person is the actual offender, he shall be entitled upon complaint made by him in this behalf and on his furnishing the known address of the actual offender and on giving to the prosecutor not less than three clear days notice in writing of his intention to do so, to have that other persons brought before the court on the date appointed for the hearing of the case; and if after the commission of the offence has been proved, the owner, agent or manager of the mine, as the case may be proves to the satisfaction of the court-(a) that he has used due diligence to enforce the execution of the relevant provisions of this act, and (b) that the owner person committed the offence in question without his knowledge, consent or connivance, the said other person shall be convicted of the offence and shall be liable to the like punishment as if he were the owner, agent or manager of the mine and the owner, agent or manager, as the case may be, shall be acquitted, Provided that - (a) the owner, agent or manager of the mine as the case may be, may be examined on oath and his evidence and that of any witness who he calls in support shall be subject to cross examination by or on behalf of the person he alleges as the actual offender and by the prosecutor, (b) If inspite of due diligence the person alleged as the, actual offender cannot be brought before the court on the date appointed for the hearing of the case, the court shall adjourn from the hearing thereof from time to time so however that the total period of such adjournments does not exceed three months, and if by the end of the said period the person alleged as the actual offender cannot be brought before the court, the court shall proceed to hear the case against the owner, agent or manager as the case may be."

30. Section 18 of the Act of 1952 provides about duties and responsibility of the owners, agents and the Managers. Clause (iii) of Sub-section 5 of Section 18 of the Act of 1952 specifically provides about responsibility of owner and agent of

mine. The word "owner" has not been defined, though "agent" has been defined under the Act of 1952. The provision aforesaid is to be read along with Section 76 of the Act of 1952. It is to find out that if mine is owned by the company, who would be responsible for compliance of the provisions and in case of violation, to be prosecuted and punished. Section 76 of the Act of 1952 was referred by both the learned counsel.

31. Learned counsel Mr. R.D. Rastodi referred Section 76 of the Act of 1952 to show that whenever company owns a mine, who would be responsible and be prosecuted and at the same time, learned counsel Mr. Mahendra Singh has shown that once the Manager is available, the Directors and others cannot be held responsible.

32. Section 76 of the Act of 1952 provides about determination of owners. In case of company, it would be all or any of the Directors or Managers would be responsible for affairs and may be prosecuted and punished. The proviso to it has been referred by the learned counsel for the non-petitioners. It is to show that company can nominate any of its Directors or Managers and herein, one Manager is made as accused. It is true that out of many accused, one is Manager but as to whether he was nominated by giving notice to the Inspector as per the proviso to Section 76 of the Act of 1952 is not on record and in absence of it, argument cannot be accepted to keep Manager alone as an accused. The careful reading of the proviso reveals that in case of a firm, association or a company, notice in writing is to be given to the Chief Inspector for nomination. The mere reference of the Manager in complaint does not comply the requirement of the proviso.

33. In view of the aforesaid, the duties and responsibilities remain on the Directors and Manager, etc. The conjoint reading of Section 18 and Section 76 of the Act makes it clear that if a company owns the mine, the duties and responsibility remain on the Directors and Managers and can be prosecuted and punished unless measures are taken up as per the proviso. The aforesaid has not been considered by the Revisional Court, thus it cannot be accepted that Manager having made accused would alone be prosecuted even if he was not nominated as per the proviso of Section 76 of the Act.

34. It is a case where the allegations in the complaint are specific. It was filed after inspection of the mines, though after the accident. It was found that compliance of various provisions has not been made. At this stage, I am not going on the issue as to who was the driver of the dumper because allegations in the complaint are also for violation of various provisions of the Act of 1952 and the Rules and Regulations made thereunder. In view of the above and taking into consideration the stage being for cognizance of offence, it cannot be said that either order for cognizance of offence or complaint deserve to be quashed against the non-petitioners even though it is as per Section 18 and 76 of the Act.

35. A reference of judgment of Hon''ble Apex Court in the case of Anita Hada (supra) has been given by the learned counsel for the non-petitioners. I find

aforesaid judgment in reference to the different set of provisions for determination of duties and responsibilities. In the case in hand, specific provision exists under the Act of 1952 for duties and responsibilities and if offence is committed by the company. The interpretation of the provision has to be given in reference to the Act applicable in the case. Section 18 of the Act of 1952 provides about responsibilities. The determination of owner is provided under Section 76 of the Act of 1952. The issues have been considered in reference to those provisions.

36. Another judgment is in the case of G.N. Verma (supra). The complaint, qua the appellant, was quashed by the Hon''ble Apex Court. The Hon''ble Apex Court considered the issue in reference to the provisions of the Act of 1952 and the facts of that case. It was found that a general statement has been made showing involvement of Chief General Manager, who was only to perform administrative duties and was not concerned about technical matters, related to the mines. The facts of that case are relevant and is to be looked into, an have been narrated in para No. 7 onwards in the said judgment.

37. The allegations in the said case was about prohibition on employment of persons for excavation of coal from the extended Block B of the Bukbuka seam till thee defects are rectified. The allegation was that notwithstanding the prohibitory order, excavation of coal was carried out from Karkata Colliery and on a particular date, a fatal accident took place. In reference to the aforesaid facts, the issue was decided. Therein, the controversy was not raised in reference to Section 76 & 77 of the Act of 1952 and Rules made thereunder. The issue was discussed and decided mainly in reference to Section 18(5) of the Act of 1952. Section 18(5) provides as to who would be responsible other than those given under Clause (i) to (iv). In view of the above, the judgment in the case of G.N. Verma (supra) does not provide assistance to the non-petitioner.

38. The judgment in the case of R.C. Bahree & Ors. has also been referred by the learned counsel for the petitioner. The judgment aforesaid was given in reference to the provision of the Act of 1952 and more specifically, Section 77 of the Act of 1952. Para No. 6 of the said judgment is quoted hereunder for ready reference:

"6. A look at Section 77 of the Mines Act is necessary which is extracted here and read as under:

77. Exemption of owner, agent or manager for liability in certain case-where the owner agent of manager of a mine accused of an offence under Ibis Act, alleges that another person is the actual offender, he shall be entitled upon complaint made by him in this behalf and on furnishing the know address of the actual offender and on giving to the prosecutor not less than three clear days notice in, writing of his intention so to do, to have the other person brought before the court on the date appointed for the hearing of the case and, if after the commission of the offence has been proved the owner agent or manager of mine as the case may be, proves to the satisfaction of the Court.

(a) that be has used due diligence to enforce the execution of the relevant provisions of this Act, and

(b) that the other person committed the offence in question without his knowledge consent or connivance the said other person shall be convicted of the offence and shall be liable to the like punishment as if he were the owner, agent or manager or the mine, and the owner, agent or manager, as the case may be, shall be acquitted.

Provided that

(a) the owner agent or manager of the mine as the case may be, may be examined on oath and his evidence and that of any witness whom he calls in support shall be subject to cross-examination by or on behalf of the person he alleges as the actual offender and by the prosecutor;

(b) if in spite of due diligence the person alleged as the actual offender cannot be brought before the court on the date appointed for the hearing of the case, the court shall adjourn the hearing there of from time to time so how even that the total period of such adjournment does not exceed three months, and if by the end of the said period the person alleged as the actual offender cannot be brought before the court, the court shall proceed to hear the case against the owner agent or manager, us the case may be.

A bare reading of the aforesaid extracted Section will show that as and when a complaint is made by the owner, agent or manager accused or an offence under the Mines Act that another person is the actual offender, then the aforesaid person or either of them shall be entitled to have that person thought before the court on the date of hearing of case. If thereafter the commission of offence has been proved the owner, agent or manager of the Mines as the case may be, can bring his case under any of the exceptions Under Section 77 of the Mines Act. It will therefore be clear that the question whether an offence is proved or not, whether the commission of an offence is proved or not, can only come not only after the statements of the prosecution witnesses are recorded but even the statement of the accused persons Under Section 313 Cr.P.C. are recorded. Can any criminal court record a finding that the commission of offence has been proved whether by ''X'' or ''Y'' or by both without an opportunity to the accused persons to produce defence evidence in so far as the commission of offence is concerned. In my opinion the answer will have to be in the negative because a finding whether the commission of offence has been proved by ''X'' or ''Y'' or by both, can only be recorded after the trial concludes and not at an earlier stage of the case. If the commission of offence is not proved a finding can only be recorded not only after the prosecution evidence is recorded but after the statements of the accused persons Under Section 313 Cr.P.C. are recorded and opportunity to lead evidence for defence is also provided to them, whether or not they avail the same. Under Section 77 of the Mines Act also all that is required is that after the conclusion of the trial the court has to first record a finding whether the commission of offence has been proved or not and if the commission of offence is not proved, then there is no option left with the court but to acquit the accused and if the commission of offence is proved further opportunity will have to be provided to the owner, agent or manager as the case may be for bringing their case under any of the exception Under Section 77 of the Mines Act. In other words in a case Under Section 72C(1)(a) of the Mines Act which is triable as a summons case as stated earlier, there have to be two stages, one trial of the case then the finding whether an offence under the aforesaid section has been committed or not and after that an opportunity will have to be granted to the owner, agent of manager of the mines as the case may be to prove by leading defence evidence that his case is covered under the exception as contained in the mines Act. Learned Counsel in support of his contention that Under Section 77 of the Mines Act the accused person cannot be asked to enter into his defence, has placed reliance on Superintendent and Remembrancer of Legal Affairs Vs. L.N. Birla and Another, AIR 1939 Cal 724 . In that case the provisions of Section 71(1) of the Factories Act (1948) were under consideration which section is pari materia with Section 77 of the Mines Act. The court said that the primary responsibility is laid upon the person in ultimate control and he can only avoid liability by giving the proof required by Section 71 and that section requires proof not only of the actual offender but proof that the controlling authority has not shirked his responsibility. The court instance case referring to Section 71(1) of the Factories Act said that:

The complaint is made in the first instance by the Inspector of Factories against the manager of occupier u/Sec. 60, Factories Act. The manager for occupied is then entitled under Sec. 71 to complain against the actual offender and if he does so, the actual offender is given notice and brought before the Court and the trial proceeds as against both persons complained against, for as stated in 56 Cal 400 at p. 405 the Section contemplates both sets of complainants and accused being before the court at the same time. The carriage of proceedings is with the original complainant on whom the onus lies of proving that the offences has been committed. Both parties complained against are concerned with the finding on this issue and both are entitled to cross-examine the prosecution witness at this stage, and to lead evidence to disprove the charge, but being accused persons they would not be entitled to give evidence themselves.

The interpretation which the learned Counsel for the petitioner wants to make of Section 77 on the aforesaid extracted portion of L.N. Birla''s case (supra) is not correct interpretation. A bare reading of the aforesaid extracted portion will show that both sets of accused persons have to be before the court have a right to cross examine the prosecution witnesses and to lead evidence to disprove the charge, but would not be entitled to give evidence themselves A question of disproving the charge can only arise after the prosecution evidence concludes and the evidence of the accused person is recorded Under Section 313 Cr.P.C. It is not that the accused-person cannot be examined Under Section 313 Cr.P.C. or have no right to lead evidence to disprove the charge levelled against them.

While referring to Section 77 of the Mines Act if has been said earlier that after the evidence of prosecution and defence is recorded the court will record the finding that the offence has been committed or not and will have to give opportunity to the accused person at that stage, if the accused person did not avail that opportunity earlier, to prove that their case falls under any of the exceptions contained in Section 77 of the Act. In the instant case it may be stated that cognizance offence was taken by the learned Magistrate, that order was challenged upto Supreme Court and all that was ordered, that P.L. Rai who according to the accused persons was the real person, should be brought before the court and is also an accused in the trial court The petitioners, for one reason or the other are delaying the trial of the case which is pending since 1975. They came to this Court more than and once and when upto Supreme Court, but did not succeed."

39. The perusal of the para quoted above reveals as to what is the impact of Section 77 of the Act of 1952. It provides about exemption in a given case, which may be availed by the non-petitioners at the appropriate stage and when compliance of Section 77 of the Act is made.

40. The Revisional Court failed to consider that as per Section 76 of the Act, a complaint is be filed against the Directors or Managers, in case, mine is held by a company. It is in absence of nomination as per the proviso. This Court should not pass order contrary to the statutory provisions. Section 76 of the Act does not provide that responsibility would be only of the Managers, Directors or Agents, who were looking after day-to-day business. The order of the Revisional Court is thus in ignorance of Section 76 of the Act, hence cannot be allowed to sustain. In view of the discussion made above, I find merit in this criminal misc. petition, accordingly it is allowed. The impugned order dated 5th May, 2006, passed by the Revisional Court is set aside.

