(2005) 08 GAU CK 0032

Gauhati High Court

Case No: Criminal Revision No. 669 of 1997

Sawarmal Agarwalla		APPELLANT
	Vs	
State of Assam and Another		RESPONDENT

Date of Decision: Aug. 24, 2005

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 155(2), 156(1), 482, 561A
- Employees State Insurance (General) Regulations, 1950 - Regulation 26
- Employees State Insurance Act, 1948 - Section 1(6), 38, 39, 40, 44

Citation: (2006) 109 FLR 108 : (2006) GLT 412 Supp : (2006) 2 LLJ 1009

Hon'ble Judges: I.A. Ansari, J

Bench: Single Bench

Advocate: A.K. Bhattacharjee and U. Baruah, for the Appellant; B.R. Dey Advocate and K.K. Nandi, S.C., for the Respondent

Final Decision: Allowed

Judgement

I.A. Ansari, J.

By making this application u/s 482, Cr.P.C. the petitioner, who is accused in CR case No. 1589 (C)/1994 of the Court of learned Chief Judicial Magistrate, Kamrup, has approached this Court with prayer to get quashed the complaint, which has given rise to the CR case No. 1589(C)/1994 aforementioned, and also to get set aside an quashed the order, dated June 27, 1995, passed therein directing issuance of warrant of arrest against the accused-petitioner.

2. The material facts and various stages, which have led to the present revision, may, in brief, be set out as follows:

Shri D.N. Das, an Inspector, appointed Under the Employees'' State Insurance Act, 1948, (hereinafter referred to as ''the ESI Act''), instituted a complaint on behalf of the Employees State Insurance Corporation (in short, ''the Corporation''), which gave

rise to CR Case No. 1589(C)/1994 aforementioned, the case of the complainant being, in brief, thus. The present accused-petitioner, namely, Sawarmal Agarwalla is the owner of a factory, which is run under the name and style of Assam Rolling Mill, Chapaguri Road, district Bongaigaon, the said factory being covered under the ESI Act, 1948. u/s 40 of the said Act, every principal employer shall pay in respect of every employee, whether directly employed by him or by or through an immediate employer, both employer''s contribution and the employee''s contribution. Every such contribution payable under the ESI Act in respect of an employee shall be paid within 21 days of the last day of the calendar month in which the contribution falls due. Under Regulation 26 of the Employee''s State Insurance (General) Regulations, 1950 (in short, ''the Regulations''), every principal employer is required to submit the return of contribution in Form-6 in quadruplicate along with the receipted copies of challans within 42 days from the date of expiry of each contribution period. The accused-petitioner, Sawarmal Agarwalla, being the principal employer, has failed to pay, within the stipulated time, contribution amounting to Rs.7058.00/- covering the period from October, 1993, to March 1994, and also he has to submit the return of the contribution in Form-6 in terms of Regulation 26 for the period aforementioned, By so omitting to comply with the provisions of the ESI Act and the Regulations, the accused, as principal employer, has committed offences punishable u/s 85(a) and 85(e) of the ESI Act. The complainant has obtained sanction from the appropriate authority for prosecution of the accused-petitioner.

3. I have heard Mr. A.K. Bhattacharjee, learned senior counsel assisted by Ms. U. Baruah, learned Counsel for the accused-petitioner. I have also heard Mr. B.R. Dey, learned senior counsel, and Mr. K.K. Nandi, learned Standing Counsel, appearing on behalf of the opposite party.

4. Presenting the case on behalf of the accused-petitioner, Mr. A.K. Bhattacharjee has submitted that before the prosecution is launched against a person u/s 85(a) and 85(e) of the ESI Act, the in-built protections, which the ESI Act has made available to the person, who is proposed to be proceeded against, must be complied with and if the same is not followed, the prosecution would be in contravention of the law and cannot be sustained. In support of this submission, Mr. Bhattacharjee, drawing attention of this Court to Sub-section (2) of Section 45-A, contends that the scheme of the ESI Act clearly shows that before launching prosecution against a person u/s 85(a) or 85(e) of the ESI Act, the Corporation must comply with the provisions of Section 45-A and must follow, particularly, the proviso to Section 45-A, which makes it incumbent upon the Corporation to give to the person, who has to be proceeded against, a reasonable opportunity of being heard before the amount due to be paid as contribution by such a person is formally demanded and/or such a person is held responsible for not filing of return in respect of the contribution to be paid in terms of Section 40 of the ESI Act.

5. As regards the alleged non-payment of contribution, which the accused-petitioner is claimed to have been bound to make, and also as regards the alleged omission of the accused-petitioner to furnish returns in terms of the Regulation 26, no notice was, points out Mr. Bhattacharjee, ever given to the accused-petitioner. In a situation, such as the present one, recourse for prosecution of the accused-petitioner u/s 85(a) or 85(e) could not have been initiated, for to enable the Corporation to sustain prosecution, it must show, emphasizes Mr. Bhattacharjee, that the principal employer or the person incharge of the factory was given reasonable opportunity of hearing before the amount of the contribution was determined. There is absolutely no material on record to show, submits Mr. Bhattacharjee, that the Corporation ever served any notice, in terms of the proviso to Section 45-A giving opportunity of hearing in this regard to the accused-petitioner. For having not complied with the proviso to Section 45-A, the prosecution launched against the accused petitioner was, according to Mr. Bhattacharjee, bad in law, but the sanctioning authority, while granting sanction u/s 86 of the ESI Act, did not, points out Mr. Bhattacharjee apply its mind to the facts of the present case. The sanction, therefore, contends Mr. Bhatacharjee, suffers from non- application of mind and is arbitrary. In a situation, such as the one at hand, reiterates Mr. Bhattacharjee, prosecution launched against the accused is bad in law and may not allowed to proceed any further and be interfered with.

6. In support of his submission that an opportunity of showing cause must be given to a person, who has to be proceeded against for alleged non-payment of his contribution, Mr. Bhattacharjee has referred to, and relied upon, Employees State Insurance Corporation v. U.P. Hotel and Restaurants Ltd. and Anr. 1975 LIC 1025 Hegde and Golay Ltd and Anr. v. Employees State Insurance Corporation Bangalore and Anr. 1981 LIC 1664 and Employees State Insurance Corporation, Delhi v. Masco Pvt. Ltd. 1982 LIC 833.

7. Controverting the above submissions made on behalf of the accused-petitioner, Mr. B.R. Dey, learned senior counsel, appearing for the Corporation, has submitted, inter alia, that the question as to whether a particular factory or establishment comes within the purview of the ESI Act and/or the question as to whether a particular person is responsible to make contribution in terms of the ESI Act and/or file return in this regard is a question, which can be determined only u/s 75 of the ESI Act by the Employees State Insurance Court (in short, ''the ESI Court'') which is constituted, for this purpose, u/s 74 of the ESI Act. Hence, when the prosecution has already been launched against the accused-petitioner for punishment under Sections 85(a) and 85(e) and if the accused-petitioner wants to claim that he is not liable to make payment, the adjudicating authority is really the ESI Court. Reference, in this regard, is made by Employees'' State Insurance Corporation Vs. M/s. F. Fibre Bangalore (P) Ltd.,

8. What is submitted by Mr. Nandi is that when the allegations contained in a complaint prima facie establish an offence, quashing of such a complaint is not possible on the ground that the accusations made in the complaint against the accused is not believable. In the present case, according to Mr. Nandi, the allegations made in the complaint prima facie establish offences alleged to have been committed by the accused and, in the face of such accusations, interference with the complaint, in exercise of powers u/s 482, Cr. P. C., is not permissible under the law. Reliance, in support of this submission, is placed by M.N. Damani Vs. S.K. Sinha and Others, and Zandu Pharmaceutical Works Ltd. and Others Vs. Md. Sharaful Haque and Others,

9. Before entering into the merit of the rival submissions made on behalf of the parties, imperative it is to note that the law with regard to quashing of criminal complaint is no longer res Integra. A catena of judicial decisions have settled the position of law on this aspect of the matter. I may refer to the case of R.P. Kapur Vs. The State of Punjab, wherein the question which arose for consideration was whether a First Information Report can be quashed u/s 561-A of the Code of Criminal Procedure, 1898. The Court held, on the facts before it, that no case for quashing of the proceeding was made out, Gajendragadkar, J. speaking for the Court, observed that though, ordinarily, criminal proceedings instituted against an accused must be tried under the provisions of the Code, there are some categories of cases, where the inherent jurisdiction of the Court can and should be exercised for quashing the proceedings. One such category, according to the Court, consists of cases, where the allegations in the FIR or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged, in such cases, no question of appreciating evidence arises and it is a matter merely of looking at the FIR or the complaint in order to decide whether the offence alleged is disclosed or not. In such cases, said the Court, it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal Court to be issued against the accused. From the case of R.P. Kapur (supra), it becomes abundantly clear that when a look into the contents of a complaint shows that the contents of the complaint, even if taken at their face value and accepted to be true in their entirety, do not disclose commission of offence, the complaint shall be quashed.

10. As a corollary to what has been discussed above, it is also clear that if the contents of the complaint disclose commission of offence, such a complaint cannot be quashed.

11. Laying down the scope of interference by the High Court in matters of quashing of FIR or complaint, the Apex Court in State of Haryana and others Vs. Ch. Bhajan Lal and others, laid down as follows:

102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a

series of decisions relating to the exercise of the extraordinary power under Article 226 of the inherent powers u/s 482 of the Code, which we have extracted and reproduced above, we give the following categories of cases by way of illustration, wherein such power could be exercised either to prevent abuse of the process of the any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines of rigid formulae and to give an exhaustive list of myriad kinds of cases, wherein such power should be exercised:

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

(2) Where the allegations made in the First Information Report and other materials, if any, accompanying the FIR do not disclose a cognizable offence justifying an investigation by police officers u/s 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

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

(4) Where the allegation in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a Police Officer without an order of a Magistrate as contemplated u/s 155(2) of the Code.

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

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

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

12. In the case of Bhajanlal (supra), the Apex Court gave a note of caution on the powers of quashing of criminal proceedings in the following words:

103. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases, that the Court will not be justified in embarking

upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice.

(Emphasis is added).

13. It is clear from a close reading of the principles laid down in the case of R.P. Kapoor (supra) and Bhajanlal (supra) that broadly speaking, quashing of a First Information Report or a complaint is possible (a) when the allegations made in the First Information Report or the complaint, even if taken at their face and accepted in their entirely as true, do not prima facie constitute any offence or make out a case against the accused, (b) when the uncontroverted allegations made in the FIR or complaint and evidence collected in support of the same do not disclose the commission of any offence and/or make out a case against the accused, and (c) when the allegations made in the FIR or complaint are so absurd and inherently improbable that on the basis of such absurd and inherently improbable allegations, no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

14. In other words, when the allegations made in a complaint disclose commission of an offence, such a complaint cannot be quashed by relying upon some other materials on which will depend the defence of the accused for, in such cases, truthfulness or otherwise of the allegations contained in the complaint or the probability of the defence plea can be determined only by effective investigation or at the trial. I am also guided to take this view from the case of State of Bihar and Another Vs. Md. Khalique and Another, wherein the Apex Court, while dealing with the'' quashing of FIR, observed as follows:

7. In Bhajanlal case, this Court has also held that the power of quashing a criminal proceeding should be exercised sparingly and with circumspection and that too in the rarest or rare cases. The present case is not rarest of rare case.

8. In view of the settled legal position and as offences have been disclosed in the FIR, the High Court ought not to have interfered with the investigation and should have permitted the police to complete it. We, accordingly, hold that the High Court has committed a grave error in quashing the entire proceedings and ought not to have thwarted the prosecution." See also Ram Pratap Yadav Vs. Mitra Sen Yadav and Another,

15. The decision in M. N. Damani (supra), relied upon by Mr. Nandi does not really change the above position of law with regard to the law of quashing of complaint/FIR inasmuch as in M. N. Damani (supra) the Apex Court has reiterated the position of law as has been indicated in State of Haryana and Ors. v. Bhajanlal and Ors. (supra). What has been emphasized in M.N. Damani (supra) is that when the uncontroverted allegations, as made in the complaint, prima facie establish an

offence, interference with such complaint in exercise of power u/s 482 is not permissible. It was observed in M. N. Damani (supra) that the High Court had not taken note of the guiding principles in Bhajanlal (supra). What, thus, M.N. Damani (supra) makes clear is that the principles laid down in Bhajanlal (supra) are required to be treated as guiding principles for determining the question as to whether the complaint shall be quashed or not. As regards Zandu Pharmaceutical Works Ltd. (supra), suffice it to mention here that in Zandu Pharmaceutical Works Ltd. (supra), the High Court had not interfered with the complaint, but the Apex Court, on noticing that the complainant had not come with clean hands, interfered and quashed the complaint.

16. Bearing in mind the principles governing quashing of the complaint as discussed hereinabove, let me, now, turn to the facts of the present case and the law relevant thereto.

17. While considering the present case, it is pertinent to note that Section 38 of the ESI Act provides that all employees in factories or establishments to which this Act applies shall be insured in the manner provided by the Act. Section 39 provides for contribution to be payable under the Act in respect of employees by the employer. Section 44 provides that the principal and immediate employer shall submit to the Corporation such return in such form and containing such particulars relating to persons employed by him or to any factory or establishment in respect of which he is the principal or immediate employer. u/s 44, when the Corporation has reason to believe that a return should have been submitted but has not been so submitted it may require any person to furnish such particulars as it may consider necessary for enabling the Corporation to decide whether the factory or establishment is a factory or establishment to which the Act applies. While Section 45 empowers the Corporation to appoint persons as Inspectors, who are entitled to inspect books in order to enquire into the correctness of the particulars stated in any return referred to in Section 44, Section 45-A provides that when returns, particulars, registers or records are not submitted, furnished or maintained in accordance with the provisions of Section 44 or any Inspector is obstructed by the principal employer in exercising his powers or in discharging his duties u/s 45, the Corporation may, on the basis of the information available to it, by order, determine the amount of contribution payable in favour of the employees of the factory or establishment concerned.

18. Section 45-A is of great relevance in. the present case and is, therefore quoted hereinbelow:

45-A. Determination of contribution in certain cases. (1) Where in respect of a factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of Section 44 or any Inspector or other official of the Corporation referred to in Sub-section (2) of Section 45 is (prevented in any manner) by the principal or immediate employer or any

other person, in exercising his functions or discharging his duties u/s 45, the Corporation may, on the basis of information available to it, by order, determine the amount of contributions payable in respect of the employees of that factory or establishment, provided that no such order shall be passed by the Corporation unless the principal or immediate employer or the person in charge of the factory or establishment has been given a reasonable opportunity of being heard.

19. It is also necessary to bear in mind the provisions of Regulation 26, which runs as follows:

26. Return of contributions to be sent to appropriate office. -(I) Every employer shall send a return of contributions in quadruplicate in Form 6 along with receipted copies of challans for the amounts deposited in the Bank, to the appropriate office by registered post or messenger, in respect of all employees for whom contributions were payable in a contribution period, so as to reach that office-

(a) within 42 days of the date of the termination of the contribution period to which it relates,

(b) within 21 days of the date of permanent closure of the factory or establishment as the case may be,

(c) within 7 days of the date of receipt of requisition in that behalf from the appropriate office.

20. A microscopic and careful reading of the scheme of the ESI Act, Rules and Regulations framed thereunder reveal that irrespective of the fact as to whether a code number has been given to a factory or not, if the factory or the establishment does not file return, the corporation has to make, in terms of Section 45-A(1) of the ESI Act, an assessment of the contribution payable in respect of such a factory or the establishment during the contribution period, in question. It is on the basis of such a determination of the amount of contribution that the demand has to be raised by the Corporation. The proviso to Section 45-A(1) makes it clear that no order of assessment as to what shall be the contribution of the factory or the establishment, in question, shall be made unless the principal or immediate employer or the person in charge of the factory or establishment has been given a reasonable opportunity of being heard.

21. What needs to be very carefully noted is that the decisions, which Mr. Bhattacharjee has relied upon, namely, Employees'' State Insurance Corporation (supra), Hegde and Golay Ltd. and Anr. (supra), Employees'' State Insurance Corporation (supra), to support his contention that before prosecution is launched against a person for non-payment of his contribution, he needs be given an opportunity of hearing were rendered before the proviso to Section 45-A(1) was introduced. The proviso has come into force with effect from October 20, 1989. This clearly shows that the Legislature also, in their wisdom, deemed it proper to

specifically incorporate in the scheme of Section 45-A(1) that an opportunity of hearing needs to be given to the person against whom the demand for non-payment of the amount of contribution is to be raised.

22. In short, the proviso to Section 45-A(1) follows the decisions, in Employees State Insurance Corporation v. U.P. Hotel and Restaurants Ltd. and Anr. (supra), Hegde and Golay Ltd. and Anr. v. Employees State Insurance Corporation Bangalore and. Anr. (supra) and Employees State Insurance Corporation, Delhi v. Masco Pvt. Ltd. (supra) which Mr. Bhattacharjee has relied upon. In the face of this specific protection, which by way of amendment has been introduced in the year 1989, it becomes abundantly clear that before a person is asked to make payment of a contribution for an employee or employees in respect of a given contribution period, the in-built protection provided to the person under the proviso to Section 45-A(1) must be scrupulously followed. Moreover, a careful reading of the Regulation 26 shows that the return is required to be filed after the contribution is already deposited in the Bank by way of challans. Thus, there are two eventualities in which the Regulation 26 may be attracted, namely, (i) when the contribution has been paid by way of challan, but the return of the contribution in Form-6 along with the receipted copies of challans for the amounts deposited in the Bank has not been sent to the proper office by the employer, and (ii) when no contribution has been made and in consequence thereof, no return in the manner, as indicated hereinbefore, is filed.

23. The logical conclusion, therefore, is that in either of the two eventualities indicated above, the conditions precedent for filing of the return is that the employer must have deposited the amount of contribution to be paid for the employees during a given contribution period. If no such contribution is paid, the Corporation cannot straightway start prosecution, for, every quarter in respect of which contribution has not been paid, the Corporation has to determine the amount of the contribution and his determined must be done only by resorting to, and abiding by the provisions of Section 45-A(1) in their entirety.

24. The conclusion, which has been reached above, can also be examined by Anr. angle. A close survey of the scheme of the ESI Act, Rules and Regulations shows that the determination of the amount of contribution payable by the principal employer or any employer depends upon a number of factors, such as, the number of the employees, who work in the factory or establishment, which the Central Government prescribes, the rates, the wage periods, in question, etc. If a principal employer has, for instance, fifty employees in one quarter of the year, the number of employees engaged by him may increase or may even decrease in the next quarter or the same years. With the increase in the number of the employees or with the decrease in the number of the employees the amount of contribution to be paid by the employer will obviously vary. This apart, the factory or establishment may even get closed for a variety of reasons.

25. It is, therefore, not necessary that an employer''s liability to pay contribution will remain static throughout the year or throughout a number of years. In fact, an employer, who may be liable to pay contribution in one given quarter of the year, may not remain liable to pay any contribution in the next quarter. Viewed from this angle, it is clear that before the contribution is demanded by the Corporation, the Corporation is duty bound to determine the amount of the contribution, which, in the given period, the employer, who is proceeded against, has to pay. For making such a determination, the Corporation has to take recourse to Section 45A and if the authorities concerned take recourse to Section 45-A for determining the amount of contribution, the proviso appended thereto has to be followed meaning thereby that a reasonable opportunity of hearing has to be given to the person from whom the contribution is to be claimed. On determination of the amount of contribution made u/s 45-A, the demand has to be raised and if the demand is not fulfilled, the person concerned can be proceeded against for non-payment of contribution and for not filing of the return under Regulation 26, for making of the payment of contribution is, as already indicated hereinbefore, a condition precedent for filing of the return under Regulation 26. Hence, before any person is proceeded against for violation of the Regulation 26, it must be shown that he was liable to pay the contribution and he has failed to make payment of the contribution and has not filed return, thereafter, in terms of the Regulation 26 or though he made payment of the contribution, he has not filed the return. In short, thus, if I may reiterate, for involving penal provisions of Section 85(a) or (sic) 85(e), a reasonable opportunity of hearing under the proviso to Section 45-A(1) must be accorded to the person, who is sought to be proceeded against.

26. I may also pause there to point out that Sub-section (6) of Section 1 of the ESI Act lays down that a factory or an establishment to which this Act applies shall continue to be governed by this Act notwithstanding that the number of persons employed therein, at any time, falls below the limit specified by or under this Act or the manufacturing process therein ceases to be carried on with the aid of power. Now, the question is if the provisions of Sub-section (6) of Section 1 override the requirement of affording of an opportunity of hearing to the person, who is prosecuted for failure to pay contribution or for failure to file, upon payment of contribution, return under Regulation 26?

27. While answering the above question, what has to be borne in mind is that Sub-section (6) of Section 1 is a provision of general nature, which will be subject to such exceptions, which the Act itself embodies. When the provisions of the ESI Act are, once, become applicable to a factory or an establishment, such a factory or establishment, as the case may be, would continue to be governed by the provisions of the ESI Act even if the number of persons employed therein falls below the limit specified by or under the Act or the manufacturing process therein ceases to be carried on with the aid of power. What in turn, Sub-section (6) of Section 1 lays down inter alia is that the fluctuation in the number of persons employed in such a factory

or establishments as Section 1(6) envisages, shall not cease to apply the ESI Act to such factory or establishment. Section 1(6) cannot, however, make an employer, who is governed by the provisions of the ESI Act, liable to pay contribution or file return if the ESI Act, the Rules and Regulations do not so provide for and compel him. What Section 1(6) envisages is a situation, where a person is governed by the ESI Act, but the question whether he is liable to make contribution and, if so, of what amount or whether he is liable to file return, under a given provision of law, has to be tested and determined by the Act itself. The situation is like this, there may be a person, who is governed by the Sales Tax Act, and he may be liable to file annual or quarterly return, but he might not have transacted any business in a particular year. In such an event, he cannot be liable to pay tax except what is compulsorily payable by him as a registered dealer under the Sales Tax Act nor shall he be liable to file such return, which a dealer is bound to file only after paying Sales Tax for transacting business. Merely because of the fact that he is a dealer registered under the Sales Tax Act, it will not make him liable to pay any tax, which he is, otherwise, not liable to pay under the Sales Tax Act. Similarly, the application of the provisions of ESI Act shall, in terms of Section 1(6), be subject to such other provisions, which are contained in the Act and are relevant to a given case.

28. In the case at hand, the accused is also being prosecuted for non-filing of return under Regulation 26. This return is not an annual return, rather, it is a quarterly return. The filing of this return will depend upon the liability to pay contribution. The ESI Act provides for discharge of an employee. There is no provision in the ESI Act or the Rules and Regulations framed thereunder that in respect of an employee, who has ceased to be an employee or who stands discharged by the employer in accordance with the provisions of the ESI Act, Rules and Regulations, any contribution would still be required to be paid by the employer. Thus, with the fall in the member of the employees in the factory or the establishment, the quantum of contribution to be made by the employer will definitely vary.

29. Hence, when a person is to be proceeded against for omission to make contribution, bounden duty it is of the authority concerned to determine as to what the exact amount of contribution legally realizable from the person concerned is. For determination of this liability, an opportunity of hearing, in terms of the proviso to Section 45-A(1), must be provided to the person concerned. To put it differently, the mere fact that a factory or an establishment continues to be governed by the ESI Act, this will not, in itself, be sufficient to prosecute the employer unless and until the quantum of contribution payable by such an employer has been determined after due inquiry. If such a liability, upon enquiry, is found to have existed, the person concerned may be proceeded against for not making contribution or for failure to file return in terms of the Regulation 26, but if the enquiry reveals that the factory or the establishment has ceased to be operative or the employees have ceased to work, the employer cannot be prosecuted for not depositing the contribution, which he would have been, otherwise, liable to contribute. If an

employer is found not liable to deposit any contribution, the question of prosecuting him for violation of the Regulation 26 does not arise at all, for the liability to file return under the Regulation 26 arises only when the person is found liable to make contribution.

30. What surfaces from the above discussion is that notwithstanding the fact that the provisions of the ESI Act continue to apply, in the light of the provisions contained in Section 1(6) of the ESI Act, if an employer is sought to be prosecuted for failure to pay contribution or to file return in terms of the Regulation 26, incumbent it is, on the part of the authority concerned, to give an opportunity of hearing to such an employer to have his say in the matter consistent with the requirements of the proviso to Section 45-A.

31. In the case at hand, the accused-petitioner allegedly did not pay the contribution during the period from the October, 1993, to March, 1994, and also did not file the return in terms of Regulation 26. In such circumstances, the Corporation ought to have resorted to Section 45-A for determining the amount of contribution payable by the accused-petitioner during the said period by giving an opportunity of hearing to the accused-petitioner and, then, on failure of the accused-petitioner to pay the contribution and file return in respect thereof, prosecution for the offence allegedly committed under Sections 85(c) and 85(e) could have been launched.

32. As regards the contention of Mr, B.R. Dey that it is the ESI Court, which can decide the question as to whether any sum is payable as contribution by an employer or not and the Criminal Court does not have the jurisdiction to decide this aspect of the matter, what needs to be pointed out is that when prosecution has been launched against a person as an employer on the ground that he has failed to make the contribution payable, by him on behalf of an employee and file return of such contribution, the accused cannot be denied the right to question the legality of the demand raised by the Corporation and if the Corporation is unable to sustain its demand for contribution, the question of punishing the employer for not making the contribution or for not filing of return under Regulation 26 would not arise. Let us assume, for a moment, that it is the ESI Court, which is the only competent Court to decide if a particular amount of contribution was payable by the employer. In such an event, let us further assume that after the prosecution is launched, u/s 85(e) for non-payment of contribution, the employer or the person concerned raises a dispute in the ESI Court that he was not liable to pay any contribution under the ESI Act or file return. Can the ESI Court, in such a case, stop the proceedings of the Criminal Court and ask the Criminal Court to keep its proceedings suspended until the time the dispute raised by the accused petitioner in the ESI Court is determined? The answer to this question has to be an emphatic ''no'', for, the ESI Act, Rules and Regulations do not confer power on the ESI Court to stop or suspend the proceedings of a Criminal Court. Hence, when a prosecution is launched u/s 85(a), the accused cannot be denied the right to agitate before the Criminal Court that

the'' contribution demanded has not been arrived at by observing the mandatory provisions of law., If the Criminal Court is satisfied that such is'' the case, there will be no impediment, on the part of the Criminal Court, to hold that the prosecution is bad in law.

33. In the case at hand, neither the-complaint nor any of the documents/papers submitted therewith show that there was any attempt by the Corporation to determine the amount of contribution in terms of Section 45-A. Thus, the inbuilt protection, which has been made available to the accused petitioner under the ESI Act, was denied to the accused petitioner. If what Mr. Dey contends is taken to its logical conclusion, it will mean that the, prosecution launched under Sections 85(a) and 85(e) of the ESI Act in the Court of criminal jurisdiction will proceed and Criminal Court may even convict a person for having not paid the contribution and/or file return in respect thereof under Regulation 26 and, subsequently, the ESI Court may determine that the person concerned was not at all liable to pay any contribution and, therefore, the question of filing of return under Regulation 26 did not arise at all. Such an interpretation, if attributed to the scheme of the ESI Act, will be wholly irrational and will result in travesty of justice.

34. The logical conclusion, therefore, is that in the face of complete non-compliance of the provisions of Section 45-A by the Corporation before launching the prosecution, in the present case, the prosecution of the accused petitioner was wholly, as indicated hereinabove, contrary to the law contained in that behalf and cannot be sustained.

35. In other words, because of what have been pointed out above, there can be no escape from the conclusion that the prosecution launched against the accused-petitioner was without jurisdiction and must be interfered with,

36. In the result and for the foregoing reasons, this revision succeeds. The complaint, in question, and the orders passed therein including the impugned order, dated June 27, 1995, aforementioned are hereby set aside and quashed.

37. Send back the records.