Case Note: Section 47(1) of Water (Prevention and Control of Pollution) Act, 1974 states that it does not necessarily mandate the incorporation of the words "was in charge and was responsible to the company for the conduct of the business of the Company". In all complaints against the Chairman, the Managing Director or the General Manager of the Company for offences in contravention of the Act. Section 47(2) of Water (Prevention and Control of Pollution) Act, 1974, does not mandate the incorporation of the allegation that the offence was committed with the consent, connivance or was attributable to the neglect on the part of the Chairman, Director or General Manager of the Company in the complaint itself.

Equivalent Citation: AIR1986Pat133, 1986(34)BLJR154

IN THE HIGH COURT OF PATNA FULL BENCH

Criminal Misc. No. 5948 of 1983

Decided On: 28.11.1985

Mahmud Ali
Vs.
State of Bihar and Anr.

Hon'ble Judges:
S.S. Sandhawalia, C.J., P.S. Sahay and S. Shamsul Hasan, JJ.

JUDGMENT

S.S. Sandhawalia, C.J.

1. The three significant issues which have come to the fore in this reference to the Full Bench deserve a somewhat precise formulation in the following terms : --

(i) Whether Section 47(1) of the Water (Prevention and Control of Pollution) Act, 1974, necessarily mandates the incorporation of the words the was in charge of, and was responsible to the company for the conduct of the business of the company" in all complaints against a Chairman, Managing Director, or General Manager of the Company for offences in contravention of the said Act?

(ii) Whether Section 47(2) of the Act aforesaid inflexibly mandates the incorporation of the allegation that the offence was committed with the consent or connivance or was attributable to the neglect on the part of the Chairman or Managing Director or General Manager of the Company in the complaint itself?

(iii) Whether 1971 BLJR 1005 (R. N. Dutta v. State) and a long line of precedent taking a similar view both earlier and subsequent thereto with regard to the pan materia provisions of Section 10 of the Essential Commodities Act lay down the law correctly?

2. The facts giving rise to the issues aforesaid are not in serious dispute and lie in a narrow compass. The Bihar State Water Pollution Control and Prevention Board (hereinafter referred to as 'the Board') had instituted a complaint in the Court of the Chief Judicial Magistrate, Gopalganj, on the 9th May, 1981, against M/s. M. A. Paper and Card Board Factory (Pvt.) Limited, Sasamusa, District Gopalganj, for offences punishable under Sections 41 and 44 of the Water (Prevention and Control of Pollution) Act, 1974 (hereinafter referred to as 'the Act'), for the contravention of Sections 20(3), 24, 25 and 26 thereof. The primal charge against the accused company was that it was discharging vast masses of polluted water and other trade effluents from its paper factory in river "Daha" without the consent of the Board and was causing great and grave environmental problems to the society at large and to the inhabitants of the surrounding environment. By order dt. 15th May, 1981, the Chief Judicial Magistrate took cognizance of the offences under Sections 41 and 44 of the Act and transferred the case for trial to Shri B. K. Sharma, Judicial Magistrate, 1st Class, Gopalganj. During the course of the trial. P.W. 2, Anirudh Narain Jamuar, on 13th Feb., 1982 and later on the 30th July, 1982 (vide Annexure '3' to the petition) deposed in Court that petitioner Mohmud Ali was the Managing Director in charge and responsible to the Company for the conduct of the business both at the time of commission of the offence and at the time of his deposition. On the firm basis of the said categoric statement, the prosecution filed a petition (Annexure '4') that Mohmud Ali, the petitioner, being the Managing Director of the Factory, was equally responsible and liable under Section 47 of the Act for the offence and, therefore, prayed for his summoning to stand trial therefor. By the impugned order dated the 8th of July, 1983, the learned Judicial Magistrate issued process against the petitioner. Aggrieved thereby the present petition for quashing the issue of process against the petitioner has been preferred. The primal ground on which it is rested is that the complaint had not expressly incorporated within it, the words that the petitioner was in charge and/or responsible to the Company for the conduct of the business of the Company. The further grievance made out is that neither in the complaint nor in the evidence of P.W. 2, specific allegation has been levelled that the offence was committed either with the connivance or consent of the petitioner or was attributable to any neglect on his part.

3. This case originally came up for admission before my learned Brother S. Shamsul Hasan, J. and at that very stage he expressed his disagreement with the decision in Cr. Misc. No. 7555 of 1982 decided on 6th April, 1983 and referred the matter to a Division Bench. Before the Division Bench primary reliance on behalf of the petitioner was placed on 1971 BLJR 1005 (supra) and a number of other single and Division Bench Judgments of this Court -- both prior and subsequent thereto -- taking a similar view. Doubting the correctness thereof in view of the recent decision in Municipal Corporation of Delhi v. Ram Kishan Rohtagi, AIR 1983 SC 67, the matter has been referred to the Full Bench for an authoritative decision.

4. Since the primal stand on behalf of the petitioner is rested on the reasoning and rationale of the aforesaid precedents, which have been rendered under Section 10 of the Essential Commodities Act, it becomes necessary to advert to the same at the outset. It calls for pointed notice that barring marginal verbal variations, Section 47 of the Water (Prevention and Control of Pollution) Act, 1974 and the aforesaid Section 10 are virtually in pari materia. This seems manifest when they are juxtaposed against each other :

S. 47 of the Act	S. 10 of the E.G. Act
"47 Offences by companies.— (1) Where an offence under this Act has been committed by 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 :	"10. Offences by companies.— (1) If the person, contravening an order made under S. 3 is a company, every person who, at the time the contravention 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 contravention and shall be liable to be proceeded against and "punished accordingly :
Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act 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.	Provided that nothing contained in this subsection shall render any such person liable to any punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.
(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of or, is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable 10 be proceeded against and punished accordingly.	(2) Notwithstanding anything contained in subsec. (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable 10 be proceeded against and punished accordingly.
Explanation.— For the purposes of this section.—	Explanation.— For the purposes of this section.—
(a) 'company' means any body corporate, and includes a firm or other	(a) 'company' means any body corporate, and includes a firm or other association of

association of individuals;and	individuals: and
(b) 'director' in relation to a firm means a partner in the firm."	(b) 'director' in relation to a firm means a partner in the firm."

Now, once the identity of the two statutes is established and as it manifestly is, it is worth mentioning that the learned counsel for the petitioner, Mr. Tara Kant Jha, has, by way of the closest analogy, placed firm reliance on the precedents of this Court under Section 10 of the Essential Commodities Act and their reasoning has been forcefully invoked. This is undoubtedly well-warranted. But it has to be borne in mind that the correctness of these precedents itself is the primal issue in the present case.

4A. Now before one inevitably adverts to the mass of case law, it becomes necessary and somewhat refreshing to examine the matter on principle, language and purposes of the Act itself. Relying with literality on Section 47 of the Act Mr. Tara Kant Jha had contended that Mahmud Ali, petitioner, had not in terms been specified in the complaint as the person in charge of and responsible to the company for the conduct of its business. The firm stand was that this omission and the absence 0f pleading the specific words of Section 47(1) in the complaint itself was irremediably fatal to the prosecution. It was further argued that the subsequent evidence of witnesses including P.W. 2 in the course of the trial to this effect could not cure the defect or warrant the summoning of the petitioner and his being proceeded against for the offence committed by the company,

5. To appreciate the aforesaid contention, it becomes necessary to have a broader look on Section 47 of the Act. It would seem undisputed that the Water (Prevention and Control of Pollution) Act, 1974 is a recent beneficent legislation enacted in the larger interest of a cleaner ecology. This is plainly indicated by its very preamble which is in the following terms : --

"An Act to provide for the prevention and control of water pollution and the maintaining or restoring of wholesomeness of water, for the establishment, with a view to carrying out the purposes aforesaid, of Boards for the prevention and control of water pollution, for conferring on and assigning to such Boards powers and functions relating thereto and for matters connected therewith."

Plainly enough, the prevention and absolute control of water pollution and maintaining or restoring of wholesomeness of the water resources of the country cannot but be labelled as beneficent legislation which has to be somewhat liberally construed. The violation of the provisions of the Act, apart from the individual persons, may also be committed by companies, bodies corporate, firms and other associations of individuals. Section 47 which we are called upon to construe provides specifically for offences by companies which by virtue of the Explanation was to extend to all the aforementioned bodies. It is well settled that the strict criminal liability of companies or legal persons is in a class by itself and poses problems peculiar to them. Since a legal person is a fiction of the law and does not exist in actuality, the issue of vicarious liability of the office-bearers through whom a company must necessarily act, comes to the fore. A plain reading of Section 17 of the

Act would indicate that this incorporates the stringent principle of strict vicarious criminal liability of persons who are responsible to the company for the conduct of its business or its responsible office bearers like a Director, Manager, Secretary, etc., for all offences commuted by a company. Now, strict vicarious criminal liability is somewhat of an exception to the general rule of direct personal culpability and is a modern development through statutory provisions. That there can be such vicarious criminal liability by legislative mandate is no longer in dispute. Nevertheless steeped as we are in the basic principle of criminal jurisprudence that mens rea must be an ingredient of an offence and both the act and intent must concur to constitute a crime, it needs some effort to accept whole-heartedly the legislative mandate of vicarious criminality even in the absence of either of the aforesaid ingredients.

6. The scheme of Section 47 calls for a somewhat closer attention for its true construction. The word 'company' employed therein, as has already been noticed, means any body corporate and includes a firm or other associations of individuals, and Director in relation to the firm means a partner of that firm. Sub-section (1) creates a deeming legal fiction whereby every person, who is in charge of and/or responsible to the company for the conduct of its business becomes automatically guilty of the offence committed by such a company and is liable to be proceeded against and punished accordingly. No other overt act or direct commission of the offence by such a person is necessary barring the factum of being in charge of the company or responsible thereto for the conduct of its business. As already noticed, this is so by virtue of the deeming fiction under Sub-section (1) of Section 47 and one is inclined to refer to the famous dictum of East End Dwelling Co. Ltd. v. Finsbury Borough Council. (1952) AC 109 at Pp. 132-133:--

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of these in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

The aforesaid rule stands approved and affirmed by the Final Court in State of Bombay v. Pandurang Vinayak, AIR 1953 SC 244 and Boucher Pierre Andre v. Superintendent, Central Jail. Tihar. New Delhi, (1975) 1 SCC 192 : (AIR 1975 SC 164). Section 47(1), therefore, has two parts. The basic liability for the offence alleged or established is against the company as such. Once the allegation is levelled or established, then by a fiction of the law every person in charge of and responsible to the company for the conduct of its business is, in the eye of law, deemed as much guilty of the offence as the primal offending company.

7. That the aforesaid rule is stringent and rigorous is manifest. Yet this is sought to be tempered and a shade softened by the proviso to Sub-section (1). This lays down that such a person on whom vicarious liability has been foisted may wriggle out of the same (if one may use that word) if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of the offence. The burden of proof is clearly laid upon such a person and it is thus plain that the proviso is a rule of evidence which reverses the ordinary mandate of criminal liability that the burden of establishing the offence lies on the prosecution. Thus

viewed, Section 47(1) and the proviso thereto would lay down that once the offence is either alleged or established against the company and the added factum of being in charge of and responsible to the company for the conduct of its business is existent against a person, he becomes liable therefor, without more, vicariously. The burden is then laid upon him to establish and prove a total absence of knowledge about the commission of the crime or a diligent prevention thereof.

8. Analysed as above, Section 47(1) spells out a deeming fiction of vicarious liability and a rule of evidence laying the burden of proof on persons in charge of and responsible to the company for the conduct of its business.

9. Once it is held as above, the argument of the learned counsel for the petitioner falls in its place and stands conclusively repelled. It is settled beyond cavil that rules of evidence and deeming fictions are not to be expressly spelt out and pleaded. They are matters which are for consideration and application in the course of the trial. To require that the complaint itself must plead a rule of evidence or, in terms, spell out a deeming fiction provided by the statute therein is an argument bordering on hyper technicality. One must always keep in mind the broader perspective that the administration of criminal law is more a matter of substance than of form and should not be allowed to be obscured by pettifogging technicality. This aspect seems to be well covered if not wholly concluded by the recent Full Bench judgment of this Court in Ram Kripal Prasad v. State of Bihar, 1985 Pat LJR 271 : (1985 Cri LJ 1048). Therein also in the context of Section 14 of the Employees Provident Funds Scheme. 1952 it was argued that the petition of complaint must, in term, plead each and every relevant fact including the precise number of employees in the establishment. Repelling such a contention on principle and precedent, it was concluded by the Full Bench in the terms following : --

"To sum up on this aspect, the answer to question No. (iii) formulated at the outset has to be rendered in the negative and it is held that a petition of complaint for offences under Section 14 of the Act need not in terms plead each and every minuscule relevant fact nor the precise number of employees of the prosecuted establishment. In any event, the failure to do so does not vitiate the proceedings on such technical ground alone."

10. Now, as regards the stand of the learned counsel for the petitioner that no proceeding could be initiated under Section 319 of the Criminal Procedure Code (hereinafter to be referred to as the 'Code') on the basis of the testimony of P.W. 2 and further that the said testimony again did not use the magic incantation of the words of Section 47(1), the same has only to be noticed and rejected in view of the recent binding precedents of the Final Court. P.W. 2 in his deposition in court expressly deposed as follows : --

"13. The case in question has been instituted for the offence of 1979-80. During this period Sri Mohammad Ali was the Managing Director of the accused factory. Even today he is the Managing Director.

XX XX XX

14. During investigation it was discovered that Mohmud Ali is the Managing Director of the accused firm. There is paper in my office to this effect. After filing the complaint the said paper was found out."

Now it is manifest from the above that the categoric allegation in the evidence was that the petitioner was the Managing Director of the company and this is a fact which is undisputed on the record and even in the argument at the Bar. The Managing Director of a company from his very designation implies both the control and command of the affairs of such a company and equally a statutory liability to the company for responsible conduct of its business. It is a compendious term, which signifies both control of and responsibility to the company both in ordinary parlance and by virtue of the provisions of the Indian Companies Act. Consequently, to insist that in spite of the description of a person as a Managing Director of the Company, there must be a further pleading that he is the person in charge thereof and is responsible to it for the conduct of its business would, to my mind, suffer from the vice of literality. Of course, as the proviso to Section 47(1) shows, it is permitted. even for a Managing Director to show that he did not have any knowledge of the commission of the offence or that he acted with the greatest diligence to prevent the same. But the burden of proof is laid upon him. The factum of being the Managing Director of the company is by itself sufficient to attract the provisions of Section 47(1) and the vicarious liability specified therein. The specific words therein he was in charge of and was responsible to the company for the conduct of the business of the company are not a magic incantation which, unless respected, would vitiate a prosecution if the substance of the matter is well spelt out either in the complaint itself or in categoric terms by acceptable testimony.

11. The view aforesaid receives direct support from Municipal Corporation of Delhi v. Ram Kishan Rohtagi, (AIR 1983 SC 67) (supra). Therein even with regard to the lesser rank of officer like the Manager, their Lordships observed as follows : --

"So far as the Manager is concerned, we are satisfied that from the very nature of his duties it can be safely inferred that he would undoubtedly be vicariously liable for the offence; vicarious liability being an incident of an offence under the Act."

On this line of reasoning their Lordships, in fact, reversed and set aside the order of the Delhi High Court which had quashed the proceedings against the Manager on similar grounds as are sought to be canvassed before us on behalf of the petitioner. Even more significant is the subsequent judgment of their Lordships in Municipal Corporation of Delhi v. Purshotam Das Jhunjhunwala, AIR 1983 SC 158. Therein also the High Court had quashed proceedings against the Chairman, the Managing Director and the Director of Hindustan Sugar Mills Ltd. On appeal their Lordships reversed High Court judgment to hold that primarily by virtue of their offices despite the cryptic allegation that they were in charge of the business, it was sufficient to foist them with liability. The allegation in the said case was in the following terms : --

".....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."

Construing the above, it, was held as follows : --

"Unlike the other case, para 5 of the complaint of this case gives complete details of the role played by the respondents and the extent of their liability. It is clearly mentioned that Ram Kishan Bajaj is the Chairman and R. P. Neyatia is the Managing Director and respondents 7 to 11 are the Directors of the Mill and were in charge of and responsible for the conduct of its business at the time of the commission of the offence whereas in the other case the complaint has merely drawn a presumption without any averment.

In the instant, case, a clear averment has been made regarding the active role played by the respondents and the extent of their ability. In this view of the matter, it cannot be said that para 5 of the complaint is vague and does not implicate respondents 1 to 11. As to what would be the evidence against the respondents is not a matter to be considered at this stage and would have to be proved at the trial. We have already held that for the purpose of quashing the proceedings only the allegations set forth in the complaint have to be seen and nothing further."

12. As regards the stand of the petitioner that cognizance could not be taken against the petitioner under Section 319 of the Code on the basis of the evidence of P.W. 2 a conclusive answer is again provided by the Municipal Corporation of Delhi v. Ram Kishan Rohtagi (AIR 1983 SC 67) (supra). Indeed, in the said case even with regard to the Director of the company, in whose favour the quashing of proceeding by the High Court had been upheld, their Lordships observed that they could be summoned and arrayed as accused persons if evidence subsequently discloses their implication. Referring in particular to Section 319 of the Code, it was observed as follows : --

"Although we uphold the order of the High Court we would like to state that there are ample provisions in the Cri. P.C. 1973 in which the Court can take cognizance against persons who have not been made accused and try them in the same manner along with the other accused."

and again -

"This provision (Section 319) gives ample powers to any Court to take cognizance and add any person not being an accused before it and try him along with the other accused. This provision was also the subject matter of a decision by this Court in Joginder Singh v. State of Punjab, (1979) 2 SCR 306 : AIR 1979 SC 339 where Tulzapurkar, J., speaking for the court observed thus : --

"A plain reading of Section 319(1), which occurs in Chap. XXIV dealing with general provisions as to inquiries and trials, clearly shows that it applies to all the Courts including a Sessions Court and as such a Sessions Court will have (he power to add any persons, not being the accused before it, but against whom there appears during trial sufficient evidence indicating his involvement in the offence, as an accused and direct him to be tried along with the other accused."

In these circumstances, therefore, if the prosecution can at any stage produce evidence which satisfies the Court that the other accused or those who have not been arrayed as accused against whom proceedings have been quashed have also committed the offence the Court can take cognizance against them and try them along with the other accused."

To finally conclude on this aspect, on the larger purpose of the Act and the particular language of Section 47(1} of the Act, as also on principle and binding precedent, the answer to question No. (i) posed at the outset is rendered in the negative. It is held that Section 47(1) of the Act does not necessarily mandate the incorporation of the words "was in charge of and was responsible to the company for the conduct of the business of the company" in all complaints against the Chairman, the Managing Director or the General Manager of the company for offences in contravention of the Act.

13. Adverting now to question No. (ii), it may perhaps be noticed at the very outset that what has been held above would broadly apply mutatis mutandis to Sub-section (2) of Section 47 of the Act as well. Significantly it begins with a non obstante clause and this, perhaps, would have effect independently and notwithstanding anything contained in the preceding Sub-section (1). In a way it overrides the said provision and is somewhat wider in its application. Unlike Sub-section (1) which foists vicarious liability only on persons in charge of and responsible to the company for the conduct of its business, this sub-section imposes a somewhat similar liability on a larger Class of Directors, managers, Secretaries or even other officers of the company. In a way this sub-section is envisaged to widen the net of vicarious liability and to bring within its sweep not only the primal officials of the company but even other officers thereof if the commission of the offence by the company can be established to have been done with the consent, connivance or neglect-on their part. Thus, the role and scope of Sub-section (2) is somewhat different from that of Sub-section (1), the former being applicable only to persons directly in charge of and responsible to the company and the latter having a wider application though in a given situation. They might slightly overlap. Equally the stringency of vicarious liability in the two sub-sections is variable.

14. When closely viewed, Sub-section (2) is clearly indicative of the fact that it is both a rule of evidence and yet again a deeming fiction for vicarious culpability. Perhaps the one crucial aspect herein is the use of the word 'proved' in the earlier part of the subsection. It comes into play only at the stage of the availability of adequate proof that the offence has been committed with the consent, connivance or neglect of the principal or other officers of the company. The usual and the normal rule of criminal law is that the charge must be brought home directly to the offender. However, Sub-section (2) lightens the burden by providing that even if it is proved that the principal officers were guilty of consent, connivance or negligence with regard to the offence committed by the company, they would be within the net of culpability. This is effectuated by an express deeming fiction that if any of the aforesaid ingredients is established then the officials concerned will be held guilty of that offence and be punished accordingly. Sub-section (2) may truly come into play during the course of the trial and even at its conclusion when it is proved that the offence has been committed with the consent, connivance or neglect of the company's principal officials. Thus, the stringent rule in Sub-section (2) in a way provides a second line of defence for the prosecution. Even where the case set up is that the offence has been directly, wilfully or deliberately committed by the company and its officials but the same cannot be established to the hilt, this sub-section provides that such officer would still be guilty if the relatively lower culpability of even consent or mere connivance or neglect is laid at his door. This is probably and patently due to the difficulties of proving a charge beyond reasonable doubt in cases of vicarious liability for offences committed by legal and artificial persons as compared to natural persons.

It bears repetition that this Sub-section (2) is a rule of evidence for apportioning guilt when consent, connivance or neglect is proved by its principal officer and a deeming fiction of guilt for vicarious Liability to the crimes committed by the company itself.

15. Now once it is held as above, it is well settled that a rule of evidence or a deeming fiction of the law are not to be pleaded as such. No principle warrants that either in a complaint or in a first information report the literal words of the statute must be incorporated or what is even important is that the rule of evidence with regard to burden of proof and a deeming fiction of guilt should be quoted at the foundational stage. Therefore, to require that the complaint or the first information report must inflexibly plead consent, connivance or negligence of the officers at the threshold stage is, to my mind, patently fallacious. Seen broadly, the deeming fiction is primarily one of evidence and proof and not of the literal formalities of pleading, which are foreign to the criminal law. Indeed, it must be noticed that in a particular case the prosecution charge may be one of direct, deliberate and wilful commission of the offence by the company and its officials. In such a situation, to require that they should plead at the outset that it was only by way of consent or connivance or neglect would be an absurdity and indeed, destructive or contrary to the case set up. Again, as has been noticed above, Sub-section (2) applies independently and notwithstanding anything contained in Sub-section (1), Therefore, to require that the pleading of consent, connivance or neglect must be incorporated even with regard to the guilt under Sub-section (1), which is absolute pertaining to the person in charge of and responsible to the company, is in a way rather more fallacious.

15A. To conclude on this aspect, the answer to question No. (ii) is rendered in the negative. It is held that Section 47(2) does not mandate the incorporation of the allegation that the offence was committed with the consent or connivance or was attributable to the neglect on the part of the Chairman, Director or General Manager of the company in the complaint itself.

16. Adverting now to question No. (iii), it does appear that there exists a number of precedents of this Court, both prior to 1971 BUR 1005, R. N. Dutta v. State and subsequently following the same view. It would seem that the fallacy herein stems from a misconstruction of a very brief order reported in Sri Ram Dalmia v. State, AIR 1961 Pat 361. In the said case, the complaint was originally filed against one S. C. Choudhary, the Manager of Vishnu Sugar Mills, Ltd. for an offence under the Essential Commodities Act read with the Sugar Control Order, It would appear that the evidence was led in the case and after eight months of the initiation of the prosecution on 26th May 1957 the Public Prosecutor filed an application before the Magistrate praying for several other persons being summoned. On the said application the petitioner Sri Ram Dalmia, who was one of the Directors of Messrs Vishnu Sugar Mills Ltd., was also summoned. Apparently, the matter was carried in revision to the Additional Sessions Judge, Chapra, who then made a reference to the High Court under Section 438 of the Cri. P.C. 1898 for quashing the order against the petitioner Sri Ram Dalmia. By a very brief order accepting the reference of the Additional Sessions Judge the proceedings were quashed by the High Court. It is manifest therefrom that the admitted position there was that there was no allegation in the complaint petition at all against the petitioner which as already noticed, had been originally preferred against the Manager only. Equally there was no allegation to sustain the prosecution in the public prosecutor's petition before the trial Magistrate or even in the evidence adduced before the Magistrate. Equally, the learned counsel for

the State admitted that there was no allegation on the record of any consent or connivance or neglect on behalf of the petitioner. The only stand taken on behalf of the State was that as a Director he can be said to be a part of the company and, therefore, liable. This untenable argument was rightly and brusquely rejected by the Bench. The reference of the Additional Sessions Judge was consequently accepted and the proceedings were quashed.

17. It is more than manifest that the aforesaid case of Sri Ram Dalmia v. State (supra) is plainly distinguishable and stood on its peculiar and admitted position of the total absence of any case against the petitioner in the complaint as also in the Public Prosecutor's petition as well as the evidence adduced. It was rested on the detailed reasoning and reference of the Additional Sessions Judge. However, this judgment has been subsequently misconstrued in the High Court and made the corner-stone for propositions which it plainly does not warrant even remotely. Placing primal reliance on this judgment and patently misconstruing its import, a learned single Judge in criminal Misc. Nos. 1062 and 1064 of 1967 decided on 25th April. 1968 (Anandi Lal Goenka v. Krishna Kumar Birla) quashed the proceedings against K. K. Birla, though he was expressly described as the Managing Director of the company, alleged to be guilty of the offence. It was urged before the learned single Judge that under the Companies Act a Managing Director is plainly responsible to the company for the conduct of its business and must be assumed to be in charge of its affairs. This argument was, however, cryptically brushed aside and purporting to follow Sri Ram Dalmia v. State (AIR 1961 Pat 361) (supra) the proceedings were quashed. This case is obviously in head-long conflict with the binding precedent in Municipal Corporation of Delhi v. Ram Kishan Rohtagi, AIR 1983 SC 67. In fact, this judgment clearly enough does not lay down the law correctly with regard to the Managing Director of the company and has thus to be overruled.

18. Subsequently, in Criminal Misc. No. 902 of 1968 decided on 13th Nov. 1968 (Brajendra Kumar Poddar v. State) a learned single Judge in a very brief judgment and without reference to principle or precedent seems to have said as a dictum that the partners of a firm would be liable only if it was established that the alleged contravention was committed with the consent connivance or was attributable to any neglect on their part. The learned Judge seems to have altogether missed that under Sub-section (1) if a partner was in charge of and responsible to the firm for the conduct of its business, he would be liable vicariously for an offence committed by the firm. For the reasons recorded in the earlier part of this judgment, the judgment in Brijendra Kumar Poddar v. State (supra) is unsustainable and has to be overruled.

19. Once the aforesaid two judgments were rendered, inevitable they were followed by the learned single Judges in Criminal Misc. No. 1089 of 1969 decided on 16th Jan. 1969 (Ram Narain Lal Pitteri v. State) and Tulsi Das Kanoria v. State, 1970 BLJR 969. However, the matter then came up before a Division Bench presided over by M. P. Verma, J., (who had already taken the aforesaid view) with regard to the quashing of the proceedings under Section 10 of the Essential Commodities Act against the Managing Directors and the Manager of Sitalpur Sugar Works Ltd. in R. N. Dutta's case (1971 BLJR 1005). It would appear that the petition on behalf of the Manager was later withdrawn. Primarily following the earlier single Bench Judgment and without noticing the fact that the charge was levelled against the Managing Directors who have a peculiar statutory position of power and responsibility under the Companies Act and against whom specific averments were made that they were in

charge of the business of the company, it was said as a dictum without further discussion that the complaint must contain an allegation that the offence was committed with the consent or connivance of officials or was attributable to any neglect on their part. It was also observed that the allegation that the Managing Directors were in charge of the business and were responsible for the offence was vague. Consequently the proceedings were quashed. Inevitably in the wake of this Division Bench judgment, a number of single Bench and Division Bench Judgments both reported and otherwise were rendered in line therewith without any in-depth examination of the issue. It, however, calls for a refreshing notice that C.P. Sinha. J., in Brijmohan Bayawala v. State of Bihar (1976 BLJR 610) distinguished and in a way declined to follow the reasoning in R. N. Dutta's case and held that a responsible Managing Director by virtue of his office would well be in the net in spite of the absence of a pleading of the words "in charge of and responsible to the company for the conduct of its business" in the complaint, where from the trend of the allegations the same was adequately apparent. Equally it calls for notice that in Criminal Misc. No. 2795 of 1974 decided on the 30th Aug. 1976 : (reported in 1982 BLJR 678) (Swarmal Pasari v. State of Bihar) Uday Sinha, J., sitting singly, recorded a powerful dissent holding that the decision of this Court in R. N. Dutta's case (1971 BLJR 1005) did not lay down the law correctly and required reconsideration and referred the matter to the Division Bench. Without adequately repelling the irrefutable points raised by Uday Sinha, J., the Division Bench in Sawarmal Pasari v. State of Bihar, 1982 BLJ 678 again relapsed into the beaten track of the earlier line of precedent and reaffirmed R. N. Dutta's case. It deserves passing notice that though the judgment in that case was rendered on the 30th Aug. 1976. It has been reported somewhat late in 1982. Consequently, in Ram Nath Prasad v. State of Bihar, 1983 BLJ 25 the learned single Judge followed the earlier Division Bench on the point whilst curiously holding that a person who was admittedly the proprietor of the firm could not be inferred to be a person in charge of the business of the firm without a literal incorporation of the language of the statute in the complaint itself. More directly in Hamid Ali v. Bihar State Water Pollusion Control & Prevention Board (Criminal Revn. No. 7555 of 1982 disposed of on April 6, 1983) a learned single Judge took a similar view with regard to offences under Sections 41 and 44 of the Act. This Judgment has been expressly dissented from by my learned Brother S. S. Hasan, J., in his threshold order of reference to the larger Bench in this case.

20. I have somewhat painstakingly traced the tortuous history of precedent within this Court on this point to highlight how an error stemming from a misconstruction of the ratio in AIR 1961 Pat. 361 (supra) has come to be perpetuated within this jurisdiction. In the light of the discussion under questions (i) and (ii), it is patent that this trend is untenable both on principle, the language and on an analysis of the provisions of Section 47 of the Act. This apart, this view can no longer hold the field in the wake of the refreshing and binding precedent of the Final Court beginning from AIR 1980 SC 506 (Satya Narain Musadi v. State of Bihar). Therein the view of this court in ILR (1977) 56 Pat 774 (Satya Narain Musadi v. State of Bihar) was affirmed to hold that in prosecution under the Essential Commodities Act a Court is not hyper technically bound down to look at the report under Section 173(2) of the Code only with blinkers on and is equally entitled to take notice of all documents and accompaniments thereof for the purpose of taking cognizance of the offence. As has even been noticed already in AIR 1983 SC 67, their Lordships have elaborated that in the case of a Manager the very nature of his duties would indicate that he is in charge of the business and would

have knowledge of the offence. This view is further buttressed by AIR 1983 SC 158, where in reversing High Court Judgment it has been clearly held that the designation of Managing Director, Chairman and Secretary is by itself adequately indicative of their primal role in a company. Lastly in Sheoratan Agarwal v. State of Madhya Pradesh, AIR 1984 SC 1824 their Lordships again struck down a hyper technical stand by holding that Section 10 of the Essential Commodities Act did not bar the prosecution of the company and the persons in charge of its business individually and, consequently, each one of them can be arrayed independently without joining the other in the prosecution. It thus appears to me on the massive weight of binding precedent as well that the hyper technical view typified in R. N. Dutta v. State, 1971 BLJR 1005 cannot any longer be sustained. With the deepest defences therefore, the said judgment as well as those preceding or succeeding the same in taking the identical view are hereby overruled.

21. The answer to question No. (iii) is rendered in the negative and it is held that R. N. Dutta v. State and other judgments taking the same view do not lay down the law correctly.

22. Once the answers to the three questions posed at the outset are rendered as above, they conclusively repel all the contentions and the stand taken on behalf of the petitioner. The criminal miscellaneous petition, therefore, fails and is hereby dismissed.

23. There has been inevitable delay in the trial by virtue of these proceedings and the court below will how expeditiously proceed to dispose of the same.

P.S. Sahay, J.

24. I agree.

S. Shamsul Hasan, J.

25. Having had the opportunity and privilege of going through the judgment of the Hon'ble the Chief Justice if I may say so with greatest of deference and respect, it is not possible for me to agree with the ultimate dismissal of the application and the decision arising out of the application of Section 319 of the Cr. P.C. 1973, (hereinafter referred to as 'the Code'). I am also in respectful disagreement with the view that Sub-section (2) of Section 47 of the Water (Prevention and Control of Pollution) Act, 1974 (in short, 'the Act') is a rule of evidence and not a substantive offence. I, however, agree, if I may say so with respect, that for an indictment to be operational the magic words 'in charge of and 'responsible to the company for the conduct of the business' etc. need not be set out and in view of the cited decisions of the Supreme Court, as far as Sub-section (1) of Section 47 of the Act is concerned, certain categories of officials, whose functions are well-defined and well-known can be arraigned as accused in a complaint or the report by the very nature of their office. I, however, do not agree that the facts constituting the offence and the description, if the accused is known, need not be given in the indictment. I do not agree, if I may say so with deepest respect, that the requirement of Section 319 of the Code has been fulfilled in this case, and, in my view, on the statement of P.W. 2, as set out in the judgment of Hon'ble the Chief Justice from his evidence, the Court was not justified in summoning the petitioner for trial. My reasons are as follows : --

26. One basic fact, which cannot be lost sight of, is the essential requirement of a complaint or a report by a public servant being one under Section 173 of the Code. In

either situation the offence for the commission of which an indictment is initiated, must be set out. Section 11 of the Essential Commodities Act, 1955, clearly states that the facts constituting an offence must be stated in a report by a public servant. This can be by way of a complaint or by an information sent to the police resulting in the submission of final form under Section 173 of the Code. Under the Act, however, though nothing like Section 11 of the Essential Commodities Act has been engrafted, Section 49 requires a complaint to be filed in the manner prescribed therein. This means that when a complaint is filed it must contain facts on which the prosecution wishes to base its accusation as required by the definition of the word 'complaint', as set out in Clause (d) to Section 2 of the Code, which is as follows : --

"(d) 'complaint' means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but it does not include a police report.

Explanation -- A report made by a police officer in a case which discloses after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint : and the police officer by whom such report is made be deemed to be the complainant."

Thus, it will be found that in either case the essential allegations constituting the offence intended to lead to the prosecution of an accused must be stated. In the case of complaint the matter comes direct to the Court and in the case of information to the police it comes to the Court on the submission of final form under Section 173 of the Code, but, in each case, as stated above, the allegations as distinct from proof, must be stated. If the accused is known, then it is essential to state how he is involved in the proceeding -- whether he is vicariously liable or whether he is involved due to his connivance or neglect or is directly involved.

27. I, therefore, while agreeing that the expression 'in charge of' and 'responsible to the company for the conduct of the business' etc. need not be stated, I am afraid, I cannot agree that it is not required to state how a person is in charge of and responsible to the company for the conduct of the business of the company. In the light of the Supreme Court decisions cited by the Hon'ble the Chief Justice the indictment must at least state that he is the Manager holding the post at the time the offence was committed or he was the Managing Director, who, by certain powers endowed to him under the Articles of the Memorandum of Association would be a person who would be in charge of or responsible to the company for the conduct of the business of the company or any other Director who may be so brought into the drag net by the prosecution. Undoubtedly, Section 47(1) of the Act creates vicarious liability, as stated by the Supreme Court, and a person may not be directly involved in the commission of the offence by the company, but he has to face the prosecution persona designate and by nature of his duty vicariously on behalf of the company, but, merely stating the name of the person concerned in the complaint without saying that he was the General Manager or the manner of the functioning of an individual at the appropriate occasion would render implication of the person unjustified in law.

28. I entirely agree with Hon'ble the Chief Justice that the decisions in the past, set out by him, as they justified the quashing of complaints merely because of the absence of the magic words 'in charge of and 'responsible to the company for the conduct of the business' etc. were incorrectly decided, yet, as I have stated above, the matter does not

rest there. While dealing with this matter Section 11 of the Essential Commodities Act, 1955, Clause (d) to Section 2 of the Code and Section 49 of the Act cannot be lost sight of and must be read in harmonious construction of Section 47(1) of the Act and Section 10(1) of the Essential Commodities Act.

29. While coming to Sub-section (2) of Section 47 of the Act, I agree, if I may say so with respect, that once again it is not necessary to state the words that a particular person has connived or consented to the commission of an offence by the company or that such an offence has been committed by neglect. But once again the indictment concerned must contain facts indicating how a particular person has connived or his negligence has resulted in the commission of the offence. I may, however, again state with deepest sense of respect that I do not agree that Sub-section (2) of Section 47 is interlinked with Sub-section (1) of Section 47 and is only a rule of evidence. In my view, two distinct situations are envisaged. Under Sub-section (1) on the commission of an offence by the company accused of an act of dereliction by a person not quite known, perhaps, a clerk or minor official, certain category of persons described as those, who were in charge of and responsible to the affairs of the company, would become vicariously liable, that is to say, without any actual proof of their being in any way involved in the commission of the offence. To them again the legislature endows a defence. After that, a specific offence involvement by connivance or negligence has been created, quite apart from the vicarious liability. Two clauses have been cast asunder by the non obstante clause. In Sub-section (2) of the Act any officer named therein can be prosecuted if his involvement is a personal and direct one by the act of connivance or negligence. A person may be involved both vicariously and directly. Such a situation is not unknown in criminal jurisprudence and in such an event if he is able to say that he is not negligent or has not connived, he can yet be punished for vicarious liability and vice versa. It is, however, manifest from the proviso to Sub-section (1) of the Act that a person vicariously liable can show that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence. Sub-section (1) is, therefore, distinctly separate from Sub-section (2) otherwise this proviso would have found place after Sub-section (2) of the Act.

30. Once again I am in respectful disagreement with the observation of Hon'ble the Chief Justice that the rule of proof beyond reasonable doubt has been slightly diluted, or if I may say so in my own crude way 'adulterated'. I may recall the famous case of Woolmington v. Director of Public Prosecutions 1935 AC 462 in which Lord Viscount Sankey described the requirement to prove an indictment beyond reasonable doubt as a golden thread in the web of the English Criminal Law and further went on to give stress that in all cases the prosecution must prove its case beyond all reasonable doubts and that the defence can show that it is entitled to the benefit of doubt by the rule of preponderance of probabilities as the dictum of the aforesaid case has been applied and accepted in India at all time prior to the Constitution and reiterated by the Supreme Court. Whether a person is found to be vicariously liable or is liable in his own acts of omission or commission, the prosecution has still to prove the allegation beyond all reasonable doubts. A welfare legislation will not justify an arbitrary prosecution.

31. I now proceed to take up the question which is the real issue in this application, that is, the action of the court below in summoning the petitioner in exercise of the power endowed by Section 319 of the Code. In my view, as I have stated above, there

is no material whatsoever justifying the summoning of the petitioner, if I may say so with respect. The stage of indictment and cognizance are entirely separate from an action under Section 319 of the Code. In the former the court proceeding under Section 190 has only to see whether an offence has been made out or not and, in the latter case, before proceeding under Section 319 the Court has to see whether there is an evidence appearing against the person concerned to justify such an action. The following lines in Section 319 of the Code are vital:--

".....it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused....."

These lines indicate that in order to show the commission of an offence directly or vicariously there must be evidence. That means proof of the fact that he is the person who is what he has been described as in the complaint by bringing on the record the material particulars. The scope of Section 319 has already been set out by Hon'ble the Chief Justice, if I may say so with respect, from the decisions cited in his judgment. Testing the proposition on the anvil of those decisions it is manifest that the Court has to see whether the evidence in court has made out an offence or not. The distinction between the two steps in the same proceeding, that is, cognizance under Section 190 of the Code, and summoning under Section 319, is manifest from the decision of the Supreme Court in the case of Municipal Corporation of Delhi v. Ram Kishan Rohtagi, AIR 1983 SC 67, the relevant passages whereof have also been noticed by Hon'ble the Chief Justice. This decision clearly makes a distinction between the requirements of two stages and while holding that the case against the Director has to be quashed on the materials available in the complaint, or, if I may say so, in the absence of the materials against him in the complaint, had directed that they could be summoned if evidence is available against them under Section 319 of the Code. Evidence means oral and documentary proof of a matter which a party wishes to establish. In the case of criminal trial evidence must include all the facts on the basis of which prosecution seeks conviction of an accused. The statement of P.W. 2 set out by Hon'ble the Chief Justice clearly shows that the witness had reiterated what he would have or should have stated in the complaint. I am doubtful whether it would have been sufficient for the purpose of cognizance at that stage but that question is academic. It is certainly inadequate for summoning a person under Section 319 of the Code. All that he had managed to state was that the petitioner was the Managing Director of the Company. That is his ipse dixit without proof. He was required to state much more than that and was not justified in taking an alibi that he discovered the materials after the complaint was lodged and those materials were in his office. In other words, proof of his statement has not seen the light of the day in court nor have those documents been exhibited. The law will not countenance the summoning of a person merely by a witness endowing that person with some nouns and adjectives, like forgerer, murderer, rapist, etc. and he has to be summoned without the witness saying how these adjectives become applicable. When a witness appears in Court, he has to prove an offence and not allege an offence and the words of Section 319 mean evidence, that is, proof against the accused and not statement of an occurrence or his designation and that too after keeping back the material documents. The Court is always empowered to summon a person under Section 319 of the Code but he must do so on the basis of the evidence on the record indicating the involvement of the

person in an offence and not on the materials lying in the office of a witness and not brought before the court or on some ipse dixit without proof.

32. In my view, the prosecution has wholly failed to produce before the court some documents in the form of evidence which would justify the passing of the impugned order. If I may say so, the original prayer in the application was only against the order by which the power under Section 319 had been exercised. Reference to a Division Bench was made because I felt that in a complaint, or, for the matter of that, anywhere the magic words, as required by the earlier decisions; need not be stated but the facts constituting the offence, in my view, must be stated and more so when it passes the stage of cognizance and assume the stage of evidence in Court.

33. Coming to the Full Bench decision of this court in Ram Kripal Prasad v. State of Bihar 1985 Pat LJR 271 : (1985 Cri LJ 1048), relied upon by Hon'ble the Chief Justice, while it is true that minute parts of the allegation need not be stated in the complaint, I have no difficulty in holding that the facts that are the core of the indictment and essential ingredients of the offence, must be set out. In my view, in the case before the Full Bench if the Employees' Provident Funds Scheme, 1952, applied to an establishment, which had more than 20 employees, then the number of employees in an establishment is an essential element required to be stated if an Act creating an offence has to be applied, because absence of this essential fact will render the Act itself inapplicable and the prosecution bad. I am fortified in my view by now very well known decisions of the Supreme Court, popularly known as Kapoor's case, reported in AIR I960 SC 866, and the later decision known as 'Nagawwa's case reported in AIR 1976 SC 1947. These decisions have justified quashing of the prosecution on the ground that the facts stated in the indictment do not make out an offence. The rest of the aforesaid Full Bench decision, in my view, has no application to the present case, because, ex facie, the petitioner has been summoned after recording of evidence and not at the time of taking of cognizance when the police report or the complaint was under consideration, at which stage the Magistrate could have differed with the police report and summoned any other person to stand trial. The Magistrate has clearly acted under Section 319 of the Code and under that section the Magistrate could proceed only if there was evidence against a person. I rely strongly on the decision in the case of Joginder Singh v. State of Punjab (AIR 1979 SC 339) which decision has also been relied upon by the Full Bench. The basic question that was being determined by the Supreme Court in that decision was whether a person not committed could be summoned by the Sessions Court. The court held that the Sessions Court could do so under Section 319 of the Code and has emphasised that this must be done on the basis of the evidence recorded after the commencement of the trial. I may usefully cite few relevant lines from that decision.

"The real question centres around the scope and ambit of Section 319 of the Cr.P.C. 1973, under which a power has been conferred upon a criminal court to add a person, not being the accused before it and against whom during the trial evidence comes forth showing his involvement in the offence, as an accused and try him along with those that are being tried and the question whether a Sessions Court can add such a person as an accused in the absence of any committal order having been passed against him?

XX XX XX

A plain reading of Section 319(1), which occurs in Chap. XXIV dealing with general provisions as to inquiries and trials, clearly shows that it applies to all the courts including a sessions court and as such a sessions court will have the power to add any person not being the accused before it, but against whom there appears during trial sufficient evidence indicating his involvement in the offence, as an accused and direct him to be tried along with the other accused, but the question is whether it has power to do so without there being a committal order against such person? In this context the provisions of Sections 193 and 209 of the present Code vis-a-vis the equivalent provisions under the old Code will have to be considered....."

(Underlines have been given by me).

".....such court can add any person, not an accused before it, as an accused and direct him to be tried along with the other accused for the offence which such added accused appears to have committed from the evidence recorded at the trial.....".

10. The word 'evidence' has been defined in the Indian Evidence Act as follows : --

" 'Evidence' means and includes -

(1) all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry :

such statements are called oral evidence;

(2) all documents produced for the inspection of the Court; such documents are called documentary evidence."

34. The connotation of the word 'evidence' head (read?) in Section 319 of the Code cannot be better said than as done in Halsbury's Laws of England, Fourth Ed. Vol. 17, at page 1 relating to 'Evidence', which would be useful to cite.

Proof of facts. Evidence is the usual means of proving or disproving a fact or matter in issue. The law of evidence indicates what may properly be introduced by a party (that is, what is admissible), and also what standard of proof is necessary (that is, the quality or quantity of evidence necessary in any particular case). In short, the law of evidence governs the means and manner in which a party may substantiate his own case, or refute that of his opponent."

From what has been stated above it is clear that the evidence relied upon by the Magistrate does not come up to the standard set out by law for exercise of the power under Section 319 of the Code.

35. In the result, I hold that the impugned order dt. 8-7-1983 is fit to be quashed on the ground that Section 319 of the Code has not been applied in accordance with law. The application is allowed and the order dt. 8-7-1983 is quashed.