

(1996) 01 CAL CK 0010
In the Calcutta High Court
Case No : Matter No. 839 of 1994

Greaves Ltd. and Another

APPELLANT

Vs

State of West Bengal and Another

RESPONDENT

Date of Decision : 22-01-1996

Acts Referred:

Factories Act, 1948 — Section 2

Citation : (1996) 87 CompCas 914

Hon'ble Judges : Asok Kumar Chakravarty, J

Bench : Single Bench

Advocate : Pradip Ghosh, S. Ghose and I. Chakravarty, for the Appellant; None, for the Respondent

Final Decision : Allowed

Judgement

Asok Kumar Chakravarty, J.—The short point for consideration in this writ petition is whether any person other than a director of a company can be said to be "occupier" of a factory within the meaning of Section 2(n) of the Factories Act, 1948.

2. The facts of the case, in short, are that the petitioner-company has a factory at Plot Nos. B-9 and B-10 of Falta Industrial Growth Centre, Sector III, Falta, Diamond Harbour and is known as Power Transmission Unit 2, hereinafter referred to as "the said factory". By a resolution of the board of directors of the petitioner-company on May 27, 1993, Mr. A. B. Ghosh was nominated as the occupier of the said factory having ultimate control over the affairs of the said factory. The petitioner submitted two applications for renewal of licence in respect of the said factory for the years 1993 and 1994, respectively, to which respondent No. 2 sent a reply intimating that "the forms for 1993 and 1994 have not been signed by the occupier, i.e., by ,any of the directors within the meaning of the Factories (Amendment) Act, 1987," and requested them to rectify the irregularities immediately. The said refusal of respondent No. 2 to renew the licence has been challenged in this writ petition on the ground that the directors

of a company are not always in a position to have ultimate control over any factory as they may have to operate from a distance and that under the law any person other than a director can be the "occupier" within the meaning of Section 2(n) of the Factories Act. Section 2(n) reads as follows :

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

Provided that-

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

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

3. In the affidavit-in-opposition filed by respondent No. 2 it was alleged that there is no scope for nomination of a person other than one of the directors of the company as the "occupier" of the factory by such a resolution. It was denied that Mr. A. B. Ghosh at all material times had ultimate control over the affairs of the said factory. It was further submitted that the petitioners were directed to submit a fresh nomination in accordance with law showing one of the directors as "occupier" of the factory.

4. Heard learned counsel for the petitioners. None appeared for the respondents though an affidavit-in-opposition has been filed.

5. In order to appreciate the argument to Mr. Pradip Ghosh, learned advocate for the petitioner, the definition of the term "occupier" u/s 2(n) of the Factories Act has got to be looked into.

6. Learned counsel for the petitioners submitted that the substantive provision for determination of the "occupier" of a factory being the person having actual control over the affairs of a company the deeming provision in proviso (ii) of that section cannot be the criterion for determination of the actual "occupier" of the factory. For this purpose he referred to the case of *Kirloskar Pneumatic Company Ltd. v. V. A. More* [1993] Lab IC 1802 : [1993] 83 FJR 505 (Bom), where it was held (page 511) :

"In the first instance the plain reading of the amended provisions of Section 2(n) of the Factories Act makes it clear that Parliament never desired to wipe out the effect of the impact of decisions delivered prior to the amendment holding that the occupier need not necessarily be a director of the company. The amendment deleted the provisions of Section 100 of the Factories Act, which, inter alia, provided that where the occupier of the factory is a company, when any one of the directors thereof may be prosecuted and punished for any offence for which the occupier of the factory is punishable. The Legislature did not delete the entire provisions of Section 2(n) but retained the portion which provided that occupier of a factory means the person who has ultimate control over the affairs of the

factory. The Legislature then carved out exception by adding proviso to the substantive provisions of the definition. The proviso, inter alia, prescribes that in case of a company any one of the directors shall be deemed to be the occupier. The expression "shall be deemed to be the occupier" clearly indicates that the legal fiction is created and such legal fiction can come into play only in cases where the substantive provision is not attracted. In other words, the legal "fiction will make any one of the directors responsible as the occupier provided the company has not nominated an occupier u/s 2(n) of the Factories Act."

7. In the instant case also Sri A. B. Ghosh was nominated by the resolution of the board of directors as the "occupier" of the said factory having ultimate control over the affairs of the said factory. Since the deeming provision can only come into play in the absence of compliance with the substantive provision, i.e., where ultimate control over the affairs of a factory has not been made over to any person by any resolution to that effect that any one of the directors of the factory can be said to be "occupier" of any factory by reason of his status as one of the directors of such company. The deeming provision" in any section cannot override the substantive portion thereof.

8. An anomalous position may be created if any other view in this matter is taken. There may then be two persons having ultimate control over the affairs of the factory, viz., (1) a nominated person, and (2) one of the directors, since the actual occupier should not be confused with the deemed occupier of the factory, that is one of the directors, the insistence of respondent No. 2 for the deeming occupier when the substantive occupier by a resolution was appointed was not justified being not in accordance with the provisions of law mentioned above. Reference may be made in the case of *Wimco Ltd. v. Union of India* [1994] Lab IC 1964 [1994] 85 FJR 503 (Gauhati), where the same view was taken, namely, that a nominated occupier shall be an occupier for the purpose of Section 2(n) of the Factories Act, 1948. It, however, appears from an unreported judgment of the Allahabad High Court in the case of *Bhatia Metal Containers (P.) Ltd. v. State of Uttar Pradesh*, a copy of which has been annexed to the affidavit-in-opposition, being annexure "C" to the said affidavit, that a Division Bench of the Allahabad High Court held that the company was not permitted to nominate any person other than a director of the company as an occupier of the factory within the meaning of Section 2(n) of the Factories Act, 1948. This judgment, in any case, does not show that it has considered the decision of the Supreme Court (sic) in the case of *Kirloskar Pneumatic Co. Ltd. v. V. A. More* [1993] Lab IC 1802 [1993] 83 FJR 505 (Bom). In view of the decision of the Supreme Court (sic) referred to above, I am not in a position to follow the unreported judgment of the Allahabad High Court on this point.

9. After a careful consideration of the facts and circumstances of this case and the provisions of law in this matter, I am to hold that if any person is nominated and appointed by a resolution of the board of directors of a company as "occupier" of the factory, he shall be the "occupier" of the factory within the

meaning of Section 2(n) of the Factories Act, 1948. In the absence of any such resolution, one of the directors of a company shall be deemed to be the occupier of the factory.

10. The writ petition is accordingly allowed. The impugned letters dated September 7, 1993, and January 27, 1994, being Annexures "D" and "G" to the writ petition are accordingly set aside. Respondent No. 2 is directed to renew the licence of the said factory of the petitioners forthwith.

11. The writ petition is finally disposed of as above without any order as to costs.

12. All parties to act on a signed copy of the operative part of the judgment on the usual undertaking.