
(2011) 04 SHI CK 0246
In the High Court Of Himachal Pradesh
Case No : Criminal MMO 140 of 2010

Qimat Rai Gupta and Others

APPELLANT

Vs

State of H.P. and Another

RESPONDENT

Date of Decision : 06-04-2011

Acts Referred:

Constitution of India, 1950 — Article 14
Factories Act, 1948 — Section 100, 2, 7, 87, 92

Citation : (2011) LLR 945 : (2011) 2 ShimLC 268

Hon'ble Judges : Dev Darshan Sud, J

Bench : Single Bench

Judgement

Dev Darshan Sud, J.—The Petitioner is aggrieved by the order passed by the learned Judicial Magistrate Ist Class, Court No. II, Nalagarh on 2.1.2010 summoning all the accused including the Petitioners as named in complaint Annexure P-12 for violation of various provisions of the Factories Act, 1948 (hereinafter referred to as "the Act"). Section 92 of the Act provides:

92. General penalty for offences—Save as is otherwise expressly provided in this Act and subject to the provisions of Section 93, if in, or in respect of, any factory there is any contravention of any of the provisions of this Act or of any rules made there under or of any order in writing given there under, the occupier and manager of the factory shall each be guilty of an offence and punishable with imprisonment for a term which may extend to (two years) or with fine which may extend to (one lakh rupees) or with both, and if the contravention is continued is continued after conviction, with a further fine which may extend to (one thousand rupees) for each day on which the contravention is so continued:

(Provided that where contravention of any of the provisions of Chapter IV or any rule made there under or u/s 87 has resulted in an accident causing death or serious bodily injury, the fine shall not be less than (twenty-five thousand rupees) in the case of an accident causing death, and (five thousand rupees) in the case of an accident causing serious bodily injury)

2. The complaint Annexure P-12 was filed by Respondent No. 3 alleging various violations of the provisions of the Act by the Petitioners herein. Four persons were named as accused namely Qimat Rai Gupta, Surjeet Gupta, Rajesh Gulia and Surinder Thakur and their designations as Occupier, Factory Manager and Site Manager. The complaint has been instituted u/s 92 of the Act.

3. The grievance of the Petitioner is that despite a valid nomination having been filed in Form-I by M/s Havells (India) Limited nominating Shri Surjeet Gupta, Director as a Occupier and Shri Rajesh Gulia as the Manager in the factory, the learned Court below has proceeded to issue process against all persons named in the complaint.

4. I have heard learned Counsel appearing for the Petitioners as also learned Additional Advocate General.

5. Learned Counsel appearing for the Petitioners submits that summoning order is illegal as according to Section 92 of the Act prosecution for violation of any of the provisions of the Act can be launched only against the Occupier and the Manager. Section 2(n) of the Act defines the occupier of a factory as a person who has ultimate control over the affairs of the factory. It reads:

2(n) "occupier" of a factory means the person who has ultimate control over the affair of the factory: (Provided that-

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

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

(iii) in the case of a factory owned or controlled by the Central Government or any State Government, or any local authority, the person or persons appointed to manage the affairs of the factory by the Central Government, the State Government or the local authority as the case may be, shall be deemed to be the occupier:)...

In J.K. Industries Ltd. and Others Vs. Chief Inspector of Factories and Boilers and Others, considering the ambit of this provision the Supreme Court held:

38. By the Amending Act of 1987 it appears that the legislature wanted to bring in a sense of responsibility in the minds of those who have the ultimate control over the affairs of the factory, so that they take proper care for maintenance of the factories and the safety measures therein. The fear of penalty and punishment is bound to make the Board of Directors of the company more vigilant and responsive to the need to carry out various obligations and duties under the Act, particularly in regard to the safety and welfare of the workers. Proviso (ii) was introduced by the Amending Act couched in a mandatory form-? any one of the directors shall be deemed to be the occupier?-keeping in view the experience gained over the years as to how the directors of a company managed

to escape their liability, for various breaches and defaults committed in the factory by putting up another employee as a shield and nominating him as the ? occupier? who would willingly suffer penalty and punishment. The state of unemployment in the country being what it is, it is not difficult to ?hire? the services of someone only for this ?job?. Proviso (ii) now makes it possible reach out to a director of the company itself, who shall be prosecuted and punished for breach of the provisions of the Act, apart from prosecution and punishment of the Manager and of the actual offender. The proviso, by making one of the directors of the company responsible for proper implementation of the provisions of the Act, to a great extent ensures that more care is taken for the maintenance of the factory and various safety measures prescribed under the Act for the health, welfare and safety of the workers are not neglected. In the case of a company, the main part of Section 2(n) would not be workable unless that provision is read along with proviso (ii). The definition of an occupier u/s 2(n) is of general application and different situations have been covered by the legislature only in different provisos appended to Section 2(n). 5 These situations were, to a large extent earlier covered by Section 100 of the Act and with the deletion of Section 100, it became imperative to take care of different situations dealt therein, by enacting various provisos to Section 2(n). Of course, the expression ?shall be deemed to be an occupier? in second proviso to Section 2(n) indicates the creation of a legal fiction but it is wrong to presume that such legal fiction can come into play only where the substantive provision of Section 2(n) is not attracted. As already observed, the substantive provision of Section 2(n) can become workable only in the case of a company, when the same is read along with proviso (ii). The deeming provision does not override the substantive provision of Section 2(n) but clarifies it. In our opinion, proviso (ii) is not ultra vires the main provision of Section 2(n) and as a matter of fact there is no conflict at all between the main provision of Section 2(n) and proviso (ii) thereto. Both can be read harmoniously and when so read in the case of a company, the occupier of a factory owned by a company would mean ?any one of the directors of the company who has been notified/identified by the company to have ultimate control over the affairs of the factory? and where no such director has been identified, then for the purposes of prosecution and punishment under the Act, the Inspector of Factories may initiate proceedings against any one of the directors as the deemed occupier.

39. The apprehension that on account of proviso (ii), the Inspector of Factories has acquired "unguided, unfettered or absolute powers" to pick and choose any director of the company for prosecution and punishment is not well founded. Section 7 lays down a mandatory obligation on the factory to notify the name of the "occupier" vests in the Board of Directors and once they notify the name and particulars of that director, the Inspector of Factories is left with no discretion to "pick and choose" any other director for prosecution etc. for the breaches committed in the factory or for contravention of the provisions of the Act. It is only when the company fails to perform its statutory obligation to notify the

name of the director u/s 7 of the Act, that the Inspector of Factories may "choose" any one of the directors as the deemed occupier and proceed against him. The area for mischief can, thus, be totally blocked by the company by notifying one of its directors as the occupier in discharge of its statutory obligations enumerated in Section 7 of the Act. That apart, the reasonableness of the restriction depends upon the circumstances obtaining at a particular time and the urgency of the evil sought to be controlled. The possibility of the power being abused is no ground for declaring the provision unconstitutional. Proviso (ii) to Section 2(n), therefore, does not offend Article 14 of the Constitution.

(emphasis supplied)

6. In these circumstances, there can be no doubt that prosecution can be launched only against the Occupier as also the Manager of the Factory. It is undisputed before me that the nomination, made vide Annexure P-6, is valid and has been accepted by the Respondents. In these circumstances, the order passed by the learned Magistrate cannot be sustained and is accordingly modified. It is directed that S/Shri Qimat Rai Gupta and Surinder Thakur shall no longer be summoned to face prosecution in the complaint and their names be treated as deleted but further proceedings shall be continued only against two other persons namely Mr. Surjeet Singh, the occupier and Mr. Rajesh Gulia the Factory Manager, who are already impleaded in the complaint. All miscellaneous order(s) are vacated. Parties to appear before the learned trial Court on 3rd May, 2011.