
(1994) 03 GAU CK 0017
In the Gauhati High Court
Case No : C.R. No. 1721 of 1988

Wimco Ltd. and Others

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 30-03-1994

Acts Referred:

Factories Act, 1948 — Section 2

Citation : (1995) 70 FLR 429 : (1995) 1 LLJ 552

Hon'ble Judges : J.N. Sharma, J

Bench : Single Bench

Advocate : P.K. Goswami and S.N. Sarma, for the Appellant; K.N. Choudhary, C.G.S.C. and A.K. Goswami, for the Respondent

Final Decision : Allowed

Judgement

J.N. Sharma, J.—This application under Article 226 of the Constitution of India has been filed praying the following reliefs:

- (a) (This prayer has not been pressed. So, the same is not necessary.)
- (b) that it be declared that even in the case of a Company occupier is the person who has ultimate control over the affairs of a factory. If a person is appointed in that regard and only in case no such person is appointed by the company a Director is deemed to be the occupier of the factory.
- (c) to issue a writ of mandamus directing Respondents Nos. 2 and 3 to cancel and/or withdraw the impugned decision/order dated March 19, 1988. i.e. Annexure-C to the writ application.
- (d) to issue a writ of mandamus directing the Respondents Nos. 2 and 3 to accept Shri Mit-tal, the person nominated by the Petitioner Company as an occupier without insisting that such an occupier should be a director of the company and also renew factory licence for the Dhubri factory for the year 1988 and every year thereafter.

2. At the time of admission on September 23, 1988 this court passed the following order:

"Pending the writ petition there shall be interim direction to the 3rd respondent, Chief Inspector of Factories, Assam restraining him from taking action against any one of the Directors of the Petitioner Company."

3. The brief facts are as follows:

The petitioner-company applied for renewal of the factory licence for 1988 to the Chief Inspector of Factories, Assam, Gauhati and the Chief Inspector of Factories by Annexure-C, letter dated March 19, 1988 wrote as follows;

"With reference to the above, please note that as per Section 2 of the Factories (Amended) Act, 1987 one of the Directors of the Company must be the occupier of the factory. So you are hereby advised to furnish nomination of one of the Directors of the Company as occupier of the factory at an early date."

4. By Annexure-D, Sri N.K. Mittal, Regional Manager of the Company, wrote that he has been appointed as occupier of the factory by resolution of the Board of Directors and it was prayed that he may be accepted as the occupier of the Dhubri factory of Wimco Limited. It was also further prayed that the factory licence may be renewed as early as possible. A reply was sent in the month of May, 1988 by the Chief Inspector of Factories, Assam, Guwahati-21 by which the Senior Inspector of Factories, Zonal Factory office, Bongaigaon, P.O. Bongaigaon was directed to make an inspection to find out the violation of provision of Section 2(n) of the Factories (Amended) Act 1987 for taking legal step against the management. It was further stated in this letter that the resolution appointing Sri Mittal as the occupier is not acceptable as he is not one of the Directors of the Company. Hence, this application.

5. Prior to amendment 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, and where the said affairs are entrusted to a managing agent, such agent shall be deemed to be the occupier of the factory: provided that in the case of a ship which is being repaired or on which maintenance work is being carried out in a dry dock which is available for hire....."

Proviso to the section is not material for this purpose. Prior to amendment, there was another section, i.e. Section 100, which reads as under:

"100(1) Where the occupier of a factory is a firm or other association of individuals, any one of the individual partners or members thereof may be prosecuted and punished under this Chapter for any offence for which the occupier of the factory is punishable:

Provided that the firm or association may give notice to the Inspector that it has nominated one of its members residing within India to be the occupier of the factory for the purposes of this chapter, and such individual shall, so long as he is

so resident, be deemed to be the occupier of the factory for the purposes of this chapter, until further notice cancelling his nomination is received by the Inspector or until he ceases to be a partner or member of the firm or association.

(2) Where the occupier of a factory is a company, any one of the directors thereof may be prosecuted and punished under this Chapter for any offence for which the occupier of the factory is punishable. Provided that the company may give notice to the Inspector that it has nominated (a director, who is resident within India) to be the occupier of the factory for the purposes of this Chapter, and (such director) shall so long as he is so resident, be deemed to be the occupier of the factory for the purposes of this Chapter, until further notice cancelling his nomination is received by the Inspector or until he (ceases to be a director)."

(The proviso is not necessary for this purpose).

6. This Section 2(n) read with Section 100 of the una-mended Act came for consideration in 1962 before the John Donald Mackenzie and Another Vs. The Chief Inspector of Factories, Bihar, Ranchi and Others, and before the Gujarat High Court in the judgment of Jyoti Switch Gears v. Chief Inspector of Factories reported in (1977) 34 Fac LR 354 (Gujarat) where definition of occupier was considered and the Gujarat High Court came to the conclusion that the man claiming to be an occupier must have ultimate control over the affairs of the factory and it was further held in the facts of that case that the Manager of the Company was an occupier within the definition of the Act. The same was the view of Orissa High Court in the judgment in the case of Orient Paper Mills Ltd. v. Chief Inspector of Factories, Orissa reported in 1979 Lab IC 746 Allahabad High Court judgment in British India Corporation v. State of U.P. reported in 1982 Lab IC 1499 and in the judgment of Bombay High Court reported in 1984 Lab IC 1614 (Suresh Kalachandv. Collector of Bombay).

7. The basis for holding whether a person is occupier or not is to be ascertained by deciding the question whether the person is in the ultimate control of the factory. The Act was amended in 1987. The definition of occupier u/s 2(n) now reads as under:

"(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;

8. By the aforesaid amendment, Section 100 of the old Act is omitted. Apart from the said amendment relating to the word occupier, there are certain other amendments which are also introduced like introduction of Section 7A which now lays down the general duties of the occupier. Apart from the said amendment, a

new Chapter IV A is also introduced which deals with the provisions relating to hazardous processes. Section 41B deals with compulsory disclosure of information by occupier. Section 41C lays down further responsibilities of an occupier in relation to hazardous processes.

9. I have heard Sri P.K. Goswami, learned counsel for the petitioner. No affidavit-in-opposition has been filed nor any record has been produced. Sri Goswami submits as follows:

(j) that by adding the proviso to Section 2(n) and deletion of Section 100, the law is not changed materially. He submits that the material part of Section 2(n) remains unaltered. He further submits that the proviso was added in view of the fact that the entire Section 100 has been omitted.

(ii) the proviso will operate only in cases where there is no nomination by the Company of any other person to be an occupier.

(iii) an occupier means as found by decisions of different High Courts, before amendment that person who is in ultimate control over the affairs of the factory. As such it is submitted that the decision of the Chief Inspector of Factories, Assam vide Annexure-C directing nomination of one of the Directors of the Company as occupier of the Factory is not sustainable. The Constitutional validity of Section 2(n) was challenged in the application, but no argument has been advanced on this point. Sri Goswami further submits that definition of Section 2(n) itself will show that Director is not to be the occupier. It is necessary who has ultimate control over the affairs of the factory and not over the affairs of the company. Sri Goswami places before me two decisions of (i) Karnataka High Court being WP Nos. 22903 to 22905 of 1989, date of judgment June 15, 1990, reported in (1990) 2 Lab LN 189 (Kant). It is reported in (1992) 65 Fac LR 790: (Bombay) (K.P. Co. Ltd. v. V.A. More) The Karnataka High Court considered both the amended and the old definitions of occupier in Section 2(n) and the effect of deletion of Section 100 and came to the following finding in para 6 of the judgment:

"When interpreting the provisions of Section 100 of the Act which clearly indicated an identical language the Courts have interpreted and stated that notwithstanding what is stated in Section 100 it is permissible to nominate any other person as an occupier if the Board of Directors so resolved for it....."

After considering a large number of cases, the Karnataka High Court came to the following finding:

"Hence, the effect of reading the whole of the Section 2(n) is that not only the person in ultimate control of the factory, but also the persons categorised in the proviso are liable to be deemed as occupier, subject to the operative provisions of the Act. Hence, an application for registration of a factory or renewal thereof can be signed by an officer of the company authorised on that behalf even though he

may not be a director, partner or an individual of an association of persons and he may also be shown to be an occupier in full control of the factory."

The contention that after the amendment only a Director can be nominated as occupier was considered by the Court in paragraph 8 of the judgment and was held that it is not necessary that a person who is in ultimate control of the factory may be nominated as the occupier because, the court pointed out that the Director of the Company in a number of cases may not be in ultimate control of the factory. The next case relied on by Sri Goswami is Writ Petn. No. 5919 of 1988 Kirloskar Pneumatic Co. Ltd. v. V.A. More date of judgment August 25, 1992: (reported in 1993 Lab IC 1802) before the Bombay High Court where also Section 2(n) came up for consideration. The Bombay High Court referred to the judgment of the Supreme Court in 1962. It also considered the effect of the amendment, because of the necessity of the decision in M.C. Mehta and another (II) Vs. Union of India and others, and the court inter alia held as follows:

(i) In the first instance, a plain reading of the amended provisions of Section 2(n) of the Factories Act makes it clear that the Parliament never desired to wipe out the effect of impact of decisions delivered prior to the amendment holding that the occupier need not necessarily be a director of the company.

(ii) 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.

(iii) The only question which requires determination is whether any person other than the director of the company can be an occupier u/s 2(n) of the Factories Act and to that question our answer is in the affirmative. In our judgment, the Inspector of Factories was clearly in error in claiming that after amendment of Section 2(n) of the Factories Act no one except a director of the company can be an occupier.

(iv) the only question which the authority is to examine is whether the person nominated is one who has ultimate control over the affairs of the factory and if it is so found, the Inspector will register him as the occupier.

This being the position of law as enunciated by the Karnataka and Bombay High Courts, now let us see whether this is good law as laid down by these two High Courts. A bare reading of Section 2(n) as amended will show that the material part of the section defining an occupier remains unaltered and so a person who has the ultimate control of the factory can be nominated as the occupier, and it also must be borne in mind that always a director may not be in the ultimate control of the factory. It is ultimate control of the factory which is the touchstone and not the ultimate control of the company. A director may live at a distance. But the ultimate control of the factory may be left to his Manager as in such a case it is the manager who will be deemed to be occupier of factory and

advisedly such a person can be nominated as the occupier. Because of certain difficulties, an occupier only would be dependable as such, an occupier of a factory assumes control and responsibility and the legislature enunciated that the occupier should be the person who would be the person responsible to ensure that the provisions of the Act are complied with. The proviso to Section 2(n) is only added to carve out an exception to the Rules that a person who has ultimate control over the affairs of the factory as an occupier. The legislature wanted to have a say that in case of a company, being the owner of the factory, the director would be deemed to be an occupier even though he may not be in the ultimate control the affairs of the factory. But this does not affect the meaning of occupier whereby an occupier as the definition shows is the person who has ultimate control over the affairs of the factory. The proviso is an exception by which the legislature provided that the director also will be deemed to be an occupier even though he may not have the ultimate control over the affairs of the factory. So, the interpretation which is sought to be given by the 3rd respondent holding that for the purpose of occupier only a director will be eligible is not legal and sustainable.

10. For the aforesaid reasons, this writ application is allowed. The letter dated March 19, 1988 (Annexure-C) to the writ application stands quashed. The nomination made by the petitioner- Company vide Annexure-D shall be considered by the Respondent No. 3 in the light of the decisions as indicated above. I leave the parties to bear their own costs.