J.K. Industries Limited Etc.Etc vs The Chief Inspector Of Factories And ... on 25 September, 1996

Equivalent citations: AIRONLINE 1996 SC 1129

Author: K.T Thomas

Bench: K.T Thomas

PETITIONER:
J.K. INDUSTRIES LIMITED ETC.ETC.

Vs.

RESPONDENT:
THE CHIEF INSPECTOR OF FACTORIES AND BOILERS AND OTHERS ETC.

DATE OF JUDGMENT: 25/09/1996

BENCH:
ANAND, A.S. (J)
BENCH:
ANAND, A.S. (J)
THOMAS K.T. (J)

ACT:

HEADNOTE:

JUDGMENT:

WITH (W.P (C) 1129/91. C.A. NOS. 245-256/96, W.P. (C) 134/93. W.P. (C) 657/91. C.A. NOS. 244/96, 1238, 4499-4500/96, 4501/96, W.P. (C) NOS. 165/96, 187/96 AND C.A.NO.12552/96 (Arising out of S.L.P. (C) No. 12498/96) J U D G M E N T DR. ANAND. J.

C.A.No. 12552/96 Leave granted in SLP (C) No. 12498/96.

In this batch of cases, both in the writ petitions and in the appeals by special leave, short facts, which are not in dispute and are relevant for the discussion hereinafter, are that the Chief Inspector of Factories called upon the petitioners/appellants to file applications seeking renewal of the

registration of licence of their respective factories, signed by a director of the company in his capacity as the occupier of the factory and stated that a nominee of the Board of Directors, other than a Director, could not make such an application as an occupier. The correctness of that direction/opinion has been put in issue in all these cases. The petitioners/appellants have also called in question the constitutional validity of proviso

(ii) to Section 2 (n) of the Factories Act, 1948 (hereinafter referred to as 'the Act') as amended by Act 20 of 1987, as violative of Articles 14, 19(1) (g) and 21 of the Constitution of India.

The basic question which requires our consideration is whether in the case of a company which owns or runs the factory, is it only a director of the company who can be notified as the occupier of the factory within the meaning of proviso (ii) to Section 2 (n) of the Act, or whether the company can nominate any other employee to be the occupier by passing a resolution to the effect that the said employee shall have 'ultimate control over the affairs of the factory'. If the answer to the question is that in the case of a company, only a director can be notified as an occupier under the Act, the next question which would require our consideration is about the constitutional validity of proviso (ii) to Section 2(n) of the Act as introduced by the Amending Act of 1987. The answer to these questions would depend upon the interpretation of amended Section 2(n) of the Act It would, therefore, be appropriate to first notice the provisions of Section 2 (n) as it sited prior to the amendment and as it stands today.

Section 2(n) as it stood prior to Amendment of 1987 "2(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 thee factory;

Section 2(n) as it is after Amendment of 1987 "2(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 occupier;

(iii) in the case of a factory owned or controlled by the Central Government or any State Government of any local authority, the person or persons appointed to mange 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:

Section 2(n) of the Act prior to its Amendment was required to be read along with Section 100 of the Act with a view to determine an occupier under different situations.

Section 100 as it stood prior to the Amendment of 1987 "100. Determination of occupier in certain cases - (1) Where the occupier of a factory is a firm of other association of individuals, anyone 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 in 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.
>
> Provided further that in the case of a factory belonging to the Central Government or any State Government or any local authority the person or persons appointed to manage the affairs of the factory shall be deemed to be the occupier of that factory for the purposes of this Chapter.
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> (3) Where the owner of any premises or building referred to in Section 93 is not an individual, the provisions of this Section shall apply to such owner as they apply to occupiers of factories who are not individuals."

Section 100 has since been omitted by Amendment Act 20 of 1987.

There is divergence of opinion between various High Courts in the country with regard to the interpretation and scope of proviso (ii) to Section 2(n) of the Act. That conflict also needs to be resolved.

The High Court of Karnataka in W.S. Industries (India) Ltd. and another Vs. The Inspector of Factories, Bangalore & Others [(1991) II LLJ, 480] opined that it is not necessary that the occupier must be necessarily the owner or the director of thee company and if by a resolution some other person is nominated to be the occupier who is declared to be in the ultimate control of the affairs of the factory then that person or officer would be treated as the occupier for the purposes of the Act. The Court said:

> But the main clause provides that occupier shall be one who has ultimate control of the affairs of the company. This clause read with the operative provisions of the Act makes it clear that the occupier of a factory could be a person nominated by the board or by the firm notwithstanding the fact that such a partner or director could also be

liable and the liability in respect of the operative provisions in respect of such director or partner will have to be established." (Emphasis ours) However, the constitutional validity of Section 2(n) was, not dealt with in the above case and it was observed that "it is unnecessary to go into the constitutional validity of the provisions of the Act." The Bombay High Court in the case of Kirloskar Pneumatic Company Ltd. vs. V.A. More & Others [(1993) LLJ 805] was also not called upon to decide the constitutional validity of Section 2(n) of the Act. The question debated before the High Court was whether one of the Directors only should be treated to be an occupier within the meaning of Section 2(n) or not. The High Court noticed the deletion of Section 100 by the Amending Act of 1987 and observed that the legislature had carved out an exception to the main provision by adding second proviso to Section 2(n) of the Act. The learned Judges noticed the judgment of this Court in John Donald Mackenzie and another Vs. The Chief Inspector of Factories. Bihar [1962 (SC), 1351] and opined that the said decision lays down that an occupier of a factory need not necessarily be a Director and that he can be any other persons or employee nominated, as an occupier, by the Board of Directors.

The Orissa High Court in Indo Floglabes Limited & Anr. and Straw Products Ltd. and Anr. Vs. Chief Inspector of Factories and Boilers and Others [1993 (66) FLR, 171] dealt extensively with the provisions of the Factories Act before and after the 1987 amendment. It relied upon the judgments of the Karnataka and Bombay High Courts and went on to hold that an occupier need not necessarily be a director of the company and that the only requirement is that the person to be nominated as an occupier must have the "ultimate control"

over the affairs of the factory.

The High Court of Guwahati in Wimco Ltd. & Others Vs. The Union of India & Others [1995 FLJ, 552] has followed the judgments of Karnataka, Bombay and Orissa High Courts. The Court observed:

"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 a laid down by these two High Courts. A bare reading of S. 2(n) as amended will show that the material part of the section defining an occupier remains 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 touch- stone 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 provisio to S. 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...."

The Madras High Court in ION Exchange India Ltd. (represented by as Manager) Hosur Vs. Deputy Chief Inspector of Factories, Salem [1995 LLR, 776] and the Calcutta High Court in Greaves Ltd. and Another Vs. State of West Bengal and Another [1996 LLR, 638], have also, following, the judgments of Bombay and Karnataka High Court opined that a company which owns or runs a factory can nominate a person other than a director of the company to be an occupier of the factory within the meaning of Section 2(n) read with proviso (ii) thereto. None of these High Courts has, however, dealt with the constitutional validity of the provision under consideration.

On the other hand, the High Court of Allahabad in M/s. Bhatia Metal Containers Pvt. Ltd. and Another Vs. The State of U.P. [1990 (II) LLJ, 534], the High Court of Madhya Pradesh in Standard Industries Ltd. and another etc. etc. Vs. The State of Madhya Pradesh & Others [Misc. Petition No. 3130/91 and Writ Petition No. 4419/94 etc. decided on 15.11.95], High Court of Rajasthan in Ashok Leyland Ltd. Vs. The State of Rajasthan and Others [Civil Writ Petition No. 4195/89 decided on 1.11.91] and in Jaipur Syntex Ltd. and Others Vs. State of Rajasthan and Others [1991 LLR, 380] and the High Court of Patna in Champaran Sugar Co. Ltd. Vs. The Union of India and Ors. [C.W.J.C. NO. 2254/88 decided on 3.5.88] have held that the nomination of an occupier to be made by the company under proviso (ii) to Section 2(n) of the Act can only be that of a director and of no other officer or employee of the factory or the company which owns the factory.

Prior to the enactment of the Factories Act, 1948, regulation of labour in factories was governed by the Factories Act, 1934, but as the statement of objects and reasons of the Act of 1948 shows there were various defects and weaknesses in the 1934 Act which came in the way of its effective administration. The provisions of the 1934 Act regarding safety, health and welfare of workers were found to be inadequate and unsatisfactory. In view of large and growing industrial activity in the country, an overhauling of the factories law became necessary. The Factories Act of 1948 which came into force with effect from 1st of April, 1949 was, enacted to remove some of the shortcomings noticed in the 1934 Act.

The 1948 Act is an act to consolidate the law regulating factories. It is a piece of social welfare legislation enacted primarily with the object of protecting workmen employed in factories against industrial and occupational hazards. It seeks not only to ensure that workers would not be subjected to long hours of strain but also that employees should work in safe, healthy and sanitary conditions and that adequate precautions are taken for their welfare and safety. The stringent provisions relating to the obligations of the occupiers or managers with a view to protect workers and to secure to them employment in conditions conducive to their health and safety indicate the board purpose of the Act. The Act and the Rules made thereunder impose numerous restrictions upon the occupier or manager of the factory to ensure to workers adequate safeguards for their health and physical well being and to secure to them safe and healthy conditions at the place of work. The 1948 Act was

amended by Act 94 of 1976, with a view to remove some lacunae relating to the definition of 'workers' and for improvement of the provisions in regard to safety of workers and appointment of safety officers and to provide for an enquiry in every case of a fatal accident. Some difficulties experienced in the administration of the 1948 Act even after the 1976 amendment, specially those relating to hours of employment, safety conditions and development of appropriate work culture conducive to safety and health or workers particularly in case of factories which deal with hazardous materials and the escape routes which the employers had found to shift their responsibilities on some employee or the other and escape punishment and penalty, which were also noticed in certain judgments of this Court, led the Parliament to amend the Act in 1987 which inter alia amended Section 2(n), deleted Section 100 and incorporated Sections 7, 7A, Chapter IV-A, Section 104 A and Section 106A, besides certain other provisions.

Prior to 1987, Section 2(n) of the Act which defined "occupier of a factory" had necessarily to be read alongwith Section 100 of the Act to find out an occupier under different situations. Sub-section (2) of Section 100 provided that where the occupier of a factory was a company, any one of the Directors thereof may be prosecuted and punished for any offence under Chapter X for which the occupier of the factory was punishable. Under the proviso to Section 100(2), the Company had an option to nominate one of its Directors, resident in India, who on such purposes of prosecution and punishment under the Act. There was, thus, no compulsion under Section 100(2) that only a director should be nominated as an occupier, even though in the definition of an occupier under Section 2(n), it was provided that an occupier means the person who has the ultimate control over the affairs of the factory and where such affairs are entrusted to a managing agent, such agent shall be deemed to be an occupier. Some of the companies, taking advantage of the option as contained in the proviso to Section 100(2) of the Act and noticing the stringent provisions for punishment for breach of some of the provisions for punishment for breach of some of the provisions of the Act, instead of nominating a Director, as the occupier, used to nominate some other employee or officer as an occupier of the factory and, thus, whenever any violation of the Act was committed, it was that employee or officer, who was subjected to penalty and punishment and not the Directors or any one of them. Thus, by nominating an employee or an officer as the occupier, the directors of the company who are primarily responsible for ensuring safety measures in the factory and take care of health, hygiene and welfare of the workers being in ultimate control of the management of the company which owns the factory, where able to escape prosecution and punishment even if they were found to be negligent or indifferent to the welfare of the workmen or had failed to provide adequate and proper safety measures in the factory as well as in cases where the breach was found to have been committed with their consent or connivance, or due to lack of diligence on their part. After a tragedy occurred in Delhi by the leakage of chlorine gas, this Court noticed the "escape route" which had been carved out by the Directors of the Company, which owns or runs the factory, and voiced its concern and opined that if there was negligence in looking after the safety requirements, in a hazardous industry, in particular, even the Chairman and the Managing Director besides the Board of Directors must be held responsible and liable (even when they are not the actual offenders) as that alone could ensure, reduction of, if not altogether eliminations of, risk and hazard to workmen. In M.C. Mehta & Anr. Vs. Union of India & Ors. [1986 (2) SCC, 325] it was observed:

> "So far as the undertaking to be obtained from the Chairman and Managing Director of Shriram is concerned it was pointed out by Shriram that Delhi Cloth Mills Ltd.
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> which is the owner of Shriram has several units manufacturing different products and each of these units is headed and managed by competent and professionally qualified persons who are responsible for the day to day management of its affairs and the Chairman and Managing Director is not concerned with day to day functioning of the units and it would not therefore be fair and just to require the Chairman and Managing Director to give an undertaking that in case of death or injury resulting on account of escape of chlorine gas, the Chairman and Managing Director would be personally liable to pay compensation. We find it difficult to accept this contention urged on behalf of Shriram. We do not see any reason why the Chairman and/or Managing Director should not be personally liable for payment of compensation in case of death or injury resulting on account of escape of chlorine gas, particularly when we find that according to the reports of various expert committees which examined the working of caustic chlorine plant, there was considerable negligence in looking after its safety requirements and in fact, considerable repair and renovation with and installation of safety devices had to be carried out at a fairly heavy cost in order to reduce the element of risk of hazard to the community. We may however make it clear that the undertaking to be given by the Chairman and/or Managing Director may provide that no liability shall attach to the Chairman and/or Managing Director if he can show that the escape of chlorine gas was due to an Act of God or vis major of sabotage. But in all other cases the Chairman in all other cases the Chairman or Managing Director must hold himself liable to pay compensation. That alone in our opinion would ensure proper and adequate maintenance of safety devices and instruments and operation of the caustic chlorine pant in a manner which would considerably reduce, if not eliminate, risk or hazard to the workmen and to the people living in the vicinity"

[Emphasis ours] It was, thereafter, that the Parliament stepped in and passed the Amendment Act 20 of 1987, which as already noticed, besides amending the definition of an occupier under Section 2(n) of the Act by addition of various provisos thereto also made some more significant changes in the Act. The statement of objects and reasons of Amendment Act 20 of 1987, reads:

> "Statement of Objects and Reasons"

(1) The Factories Act, 1948, provides for the health, safety, welfare and other aspects of workers in factories, The Act is enforced by the State Governments through their Factory Inspectorates. The Act also empowers the State Governments to frame rules, so that the local conditions prevailing in the State are appropriately reflected in the enforcement. The Act was last amended in 1976 for strengthening the provisions relating to safety and health at work, extending the scope of the definition of "workers", providing for statutory health surveys, and requiring appointment of safety officers in large factories.

(2) After the last amendment to the Act, there has been substantial modernization and innovation in the industrial field Several Chemical Industries have come up which deal with hazardous and toxic substances. This has brought in its strain problems of industrial safety and occupational health hazards. It is, therefore, considered necessary that the Act may be appropriately amended, among other things to provide specifically for the safeguards to be adopted against use and handling of hazardous substances by the occupiers of factories and the laying down of emergency standards and measures. The amendments would also include procedures for siting of hazardous industries to ensure that hazardous and polluting industries are not set up in areas where they can cause adverse affects on the general public.

Provision has also been made for the workers' participation in safety management.

(3) Opportunity has been availed of to make the punishments provided in the Act stricter and certain other amendments found necessary in the implementation of the Act."

It is in this background that we shall consider the scope and validity of Section 2(n) of the Act as amended in 1987. According to the definition of the 'occupier' under section 2(n), an occupier means a person who is in 'ultimate control of the affaires of the factory'. Though the word 'person' has not been defined under the Act, but under Section 3(42) of the General Clauses Act, a person has been defined to include a company or association or body of individuals, whether incorporated or not. Such a person, under Clause 2(n) of the Act, therefore, could be a company or a partnership or an association of persons or an individual. Where the factory is owned or run by a company, it would be that company which would be the occupier of the factory. Under Section 100, as it stood originally, where the occupier of the factory was a company, any one of the directors may be prosecuted and punished and the company could give a notice identifying such a director. It was, therefore, as already noticed, optional for the company to notify a director as the occupier. The company could nominate any other officer or employee also as an occupier. The Amending Act of 1987 eliminated altogether section 100 and instead introduced into Section 2(n) various provisos and in proviso (ii) provided a deeming fiction, as to what would happen if the occupier was a company. Criminal liability in case of a default would primarily attach to the company, as the occupier of the factory and, therefore, it has been provided that in the case of a company, any one of the directors of the company shall be deemed to be the occupier. To remove the ambiguity and ensure that a mere 'authorisation' by the Board of Directors of any of its employees or officers, by a resolution, to be the occupier was not allowed the object of the Act, particularly in matters of punishment and penalty the Parliament also enacted Sections 7 and 7A of the Act by the Amending Act of 1987.

Section 7(1) of the Act reads as under:

> 7(1) The occupier shall, at least fifteen days before he begins to occupy or use any premises as a factory, send to the Chief Inspector a written notice containing.
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> (a) the name and situation of the factory;
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> (b) the name and address of the occupier;

(bb) the name and address of the owner of the premises or building (including the precincts thereof) referred to in section 93:

(c) the address to which communication relating to the factory may be sent:

(d) the nature of the manufacturing process:

(i) carried on in the factory during the last twelve months in the case of factories in exist of commencement of this Act, and

(ii) to be carried on in the factory during the next twelve months in the case of all factories;

(e) the total rated horse power installed or to be installed in the factory, which shall not include the rated horse power of any separate stand-by plant;]

(f) the name of the manager of the factory for the purposes of this Act;:

(g) the number of workers likely to be employed in the factory:

(h) the average number of workers per employed during the last twelve months in the case of a factory in existence on the date of the commencement of this Act:

(i) such other particulars as may be prescribed.

7A. General duties of the occupier. (1) Every occupier shall ensure, so far as is reasonably practicable, the health, safety and welfare of all workers while they are at work in the factory.

(2) Without prejudice to the generality of the provisions of sub-section (1), the matters to which such duty extends, shall include-

(a) the provision and maintenance of plant and systems of work in the factory that are safe and without risk of health;

(b) the arrangements in that factory for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;

(c) the provision of such information, instruction, training and supervision as are necessary to ensure the health and safety of all workers at work;

(d) the maintenance of all places of work in the factory in a condition that is safe and without risks to health and the provision and maintenance of such means of access to

and egress from, such places as are safe and without such risks;

(e) the provision, maintenance or monitoring of such working environment in the factory for the workers that is safe, without risks to health and adequate as regards facilities and arrangements for their welfare at work.

(3) Except in such cases as may be prescribed, every occupier shall prepare, and, as often as may be appropriate, revise, a written statement of his generally policy with respect to the health and safety of the workers as work and the organisation and arrangements for the time being in force for carrying out that policy; and to bring the statement and any revision thereof to the notice of all the workers in such manner as may be prescribed."

Under Section 7, a notice is required to be given to the Chief Inspector, disclosing the name of the occupier at least fifteen days before he occupies or begins to use any premises as a factory. It also requires the disclosure of the name of the owner of the premises or building and the name and particulars of the Manager. Section 7A prescribes the duties of the occupier. The provisions of Section 7 and 7A when considered in the light of proviso (ii) to Section 2(n), leave no manner of doubt that it is a statutory obligation under Section 7 of the Act after 1987 to nominate the occupier before the occupier occupies or begins to use the premises to run the factory and in the case of an existing factory seek the renewal of the licence to continue to operate the factory. It is only when this statutory requirement is fulfilled that the factory would be given the licence or its licence shall be renewed in the case of existing factories. The argument of the learned counsel for the appellants/petitioners that the expression "person" in Section 2(n) implies only an individual does not bear scrutiny, when construed in the case of a company, a firm of partners or an association of persons. Where it is the company which owns or runs such a factory, it is the company which owns or runs such a factory, it is the company which has the ultimate control over the affairs of the factory, and, therefore it would be the company would be the occupier of that factory. However, since a company is a legal abstraction, it can act only through its agents who in fact control and determine the management and are the centre of its personality. Such agents are generally called the directors being the "directing mind and will" of the company. The deeming fiction under proviso (ii), therefore, only clarifies the position where company is the occupier of the factory. The legislature by providing the deeming fiction under proviso (ii) did not detract from the generality of the main provision under Section 2(n), but only clarified it. The directors are not the employees or servants of the company. They manage, control and direct the business of the company as "owners" (Section 291 of the Companies Act). The Directors are often referred to as the "alter ego" of the company. Where the company owns or runs a factory, it is the company which is in the ultimate control of the affairs of the factory through its Directors. An employee or officer of the factory or of the company, even if authorised by the board of directors by a resolution to be a person "in the ultimate control of the affairs of the

> factory" cannot be so. Such an employee only carries out orders from above and it makes no difference that he has been given some measure of discretion also and has supervisory control. He can at best be treated to be in the immediate control of the affairs of the factory or having day to day control over the affairs of the factory, the ultimate control being retained by the company itself. The legislature did not designedly use the expression immediate or day to day or supervisory control instead of ultimate control in the main provision of Section 2(n).

The word 'ultimate' in common parlance means last or final. The Oxford Advanced learner's Dictionary of Current English Encyclopedic Edition (1992), defines the word 'ultimate' to mean :

> "beyond which no other exists or is possible; last or final; from which every thing is derived; basic or fundamental; that cannot be surpassed or improved upon;
>
> greatest etc."

According to Collins Dictionary of the English Language the word 'ultimate' has been defined as:

"last; final; elemental;

fundamental; basic or essential;

highest; furthest or greatest thing."

According to Black's Law Dictionary (Sixth Edition), the word 'ultimate means:

> "at last, finally or at the end....."

There is a vast difference between a person having the ultimate control of the affairs of a factory and the one who has immediate or day to day control over the affairs of the factory. In the case of a company, the ultimate control of the factory, where the company is the owner of the factory, always vests in the company, through its Board of Directors. The Manager or any other employee, of whatever status, can be nominated by the Board of Directors of the owner company to have immediate or day to day or even supervisory control over the affairs of the factory. Even where the resolution of the Board of Directors says that an officer or employee, other than one of the directors, shall have the 'ultimate' control over the affairs of the factory, it would only be a camaflouge or an artful circumvention because the ultimate control cannot be transferred from that of the company, to one of its employees or officers, except where there is a complete transfer of the control of the affairs of the factory. Mechanical recitation of the words of Section 2(n), as a Mantra, in a resolution nominating an employee or an officer as the occupier by stating that he shall have "ultimate control over the affairs of the factory", cannot be permitted to defeat the object of the amendment. The provisions of the Act have to be construed in a manner which would promote its object, prevent its subtle evasion and foil its artful circumvention to suppress the mischief. Though, the expression ultimate control was used in Section 2(n) even prior to the 1987 amendment also but read with the

proviso to Section 100(2), it gave an opportunity to the companies owning the factory to dilute the rigor of the provision by not notifying one of its directors to be the occupier and instead nominating some employee or the other to be the ''occupier'' for purposes of punishment and penalty. The ultimate control which vests in an owner and in the case of a company in the Board of Directors cannot be vested in anyone else without completely transferring the control over the factory to that other person. The law does not countenance duality of ultimate control. If the transfer of the control to another person is not complete, meaning thereby that the transferor retains its control over the affairs of the factory, the transferee, whosoever he may be, (except a director of the company, or a partner in a partnership firm) cannot be considered to be the person having ultimate control over the affairs of the factory notwithstanding what the resolution of the Board states. The litmus test, therefore, is who has the 'ultimate' control over the affairs of the factory.

The observations of this Court in Mackenzie's case (supra) that the "ultimate control over the factory must necessarily be with an owner unless the owner has completely transferred that control to another person" are significant. Where, a company has "completely transferred" that control to another person, it would be that other person, who would have the ultimate control over the affairs of the factory to the exclusion of the transferor -company and would be its occupier. The High Courts taking the view that in the case of a company, any person nominated by the Board of Directors to be in the ultimate control of the affairs of the factory would be an occupier, whether or not he is a Director of the company, have relied upon the following observations of this Court in John Donald Mackenzie and another vs. The Chief Inspector of Factories, Bihar (supra) :

"Undoubtedly the expression 'occupier' is not to be equated with owner. But it must be borne in mind that the ultimate control over the factory must necessarily be with an owner unless the owner has completely transferred that control to another person. Whether that was done in the present case would be a question of fact. It was for the petitioners to contend that petitioner No.1 was the manager of the factory and had the ultimate control thereof to lay before the Chief Inspector of Factories the necessary material for showing that the company had in some manner transferred the entire control of the factory to petitioner No. 1".

(Emphasis supplied) and from these observations, those High Courts have concluded that the law laid down by this Court in John Donald Mackenzie's case (supra) is that the occupier of the factory need not necessarily be a Director and that any person to whom control has been transferred and who has been given the entire control over the affairs of the factory by the company through a resolution can be the occupier, even if he is not a director. In our opinion, this is not a correct reading of that judgment, which even otherwise was concerned with the pre-amendment provisions. A brief reference to the facts of that case is, therefore, necessary at this stage. Mackenzie, who was petitioner No. 1 in the writ petition, had described himself as the Manager and occupier of Bata while seeking renewal of the licence of the factory. The Chief Inspector of Factories enquired from the factory whether Mackenzie was one of the Directors of the company and pointed out that if he was not a Director, then a fresh application seeking renewal of the factory's licence signed by the occupier should be submitted. The Chief Secretary of Bata Shoe Company sent a reply to the Chief Inspector of Factories stating therein that Mackenzie was the person who had been nominated to have the ultimate control of the affairs of the factory and therefore he was an occupier within the

meaning of Section 2(n) of the Act and, thus, competent to make an application for seeking renewal of the licence. The Chief Inspector, however, returned the application stating that if Mackenzie was not a Director, then a fresh application signed by the Director is required to be submitted. The Company, thereupon, moved the High Court at Patna for quashing the direction of the Chief Inspector of Factories requiring a director only to make the application for renewal of the licence. That petition was, dismissed by the High Court. The company then filed an appeal by special leave to this court. The Court after setting out the definition of an occupier under Section 2(n) of the Factories Act went on to consider the correspondence that had been exchanged between the company and the Chief Inspector of Factories, which revealed that Mackenzie had been declared to be an occupier without his being a director of the company and held:

> "In the circumstances, therefore, the Chief Inspector of Factories was perfectly right in refusing to act on the application signed by Mackenzie and in requiring the factory to file a proper application for renewal of the licence."

(Emphasis ours) The appeal was consequently dismissed and the direction of the Chief Inspector of factories was maintained. This Court, thus, did not hold that a company can nominate any of its employee as an occupier of the factory, even if he is not a Director of the company. The judgment in Mackenzie's case, therefore, has to be understood in the context in which it was given as otherwise the decision of the Chief Inspector of Factories calling upon Mackenzie (who had been nominated as the occupier having 'ultimate control over the affairs of the factory') but was not himself a director, to have a fresh application signed by the Director submitted for renewal of the license, would not have been sustained by this Court. It is not fair or proper to read a sentence from the judgment of this Court, divorced from the complete context in which it was given and to build up a case treating as if that sentence is the complete law on the subject. Judgments of this Court are not to be read in that manner.

Mr. Jain, learned senior advocated drew our attention to an order of a three Judges Bench of this Court in special leave petition No. 4141 of 1979 dated 14.3.1980 to support his submission that the occupier of the factory owned by a company need not necessarily be one of the directors of the company. Their Lordships while dismissing special leave petition No. 4141 of 1979 filed by the State of Orissa against the judgment of that High Court observed:

> "We are of the view that the judgment of the High Court of Orissa in the instant case and that of the Gujarat High Court in Jyoti Switchgears Vs. Chief Inspector of Factories (34), Indian Factories and labour Reports 354, "that the occupier of a factory need not necessarily be either a Director or an owner of the factory is correct". In other words it is open to a Company to nominate a person other than a Director of the company as an "occupier" of the Company for the purpose of the Factories Act."

The above order, was concerned with the provisions of Section 2(n) as they stood prior to the 1987 amendment, where under there was an option available to the company, to nominate a person other than a director of the company as an 'occupier' of the company. This order, therefore, cannot advance the case of the appellants/petitioners herein, who are governed by the provisions of Section

2(n) as amended by the Amending Act of 1987.

Thus, we find that after the 1987 amendment, the true import of proviso (ii) to Section 2(n) would be that in the case of a company, which owns the factory, the company cannot nominate any one of its employees or officers, except a director of the company, as the occupier of the factory. In other words, an occupier of the factory in the case of a company must necessarily be any one of its directors who shall be so notified for the proposes of the Factories Act. Such an occupier cannot be any other employee of the company or the factory. This interpretation of an "occupier" would apply to all provisions of the Act wherever the expression occupier is used and not merely for the purposes of Section 7 or 7A of the Act.

Learned counsel for the appellants/petitioners, then, vehemently argued that proviso (ii) to Section 2(n) of the Act is beyond the scope of the main Section. Learned counsel urged that since the principal provision contained in Section 2(n) of the Act is clear, recourse cannot be had to proviso (ii) with a view to expand the ambit of the principal provision. Learned counsel further argued that proviso (ii) confers absolute, unfettered and unguided powers upon the Inspector of Factories to pick and choose any one of the directors of a company for prosecution and punishment in connection with the breach of any of the provisions of the Act by a deeming fiction when that director is himself not responsible for the contravention and proviso (ii) is, therefore, violative of Article 14 of the Constitution also. It is submitted that there is potential for abuse of power by the Inspector of Factories, both in selecting and in not selecting a director, as an occupier for prosecution, punishment and penalty under the Act:

> The learned Attorney General and learned counsel appearing for different States, on the other hand submitted that proviso (ii) to Section 2(n) of the Act does not run counter to the substantive provision and that it is an exception to the main Section and has been enacted with a view to advance the object of the Act and the intention of the legislature and it does not travel beyond the scope of the main section. It is submitted that the proviso neither offends Article 14 nor the main provision of Section 2(n) of the Act. Mr. Ashok Desai, the learned Attorney General, further submitted that the second proviso to Section 2(n), by making any one of the Directors to be a deemed occupier of the factory owned or run by a company, does not in any manner make the substantive part of the definition clause otiose and that the proviso and the main provision can be harmoniously construed. He submitted that in the case of a company, the main provision of Section 2(n) may be incapable of proper working without the aid of proviso (ii) to the said Section because the company itself may not be possible to be prosecuted and sentenced to any term of imprisonment, and hence the necessity of the deeming fiction. The learned Attorney General submitted that the apprehension expressed by the learned counsel for the petitioners that the Inspector of Factories can pick and choose any director at his whims is not well founded because Section 7 as introduced by the 1987 Amendment Act casts a duty on the company to notify, the name of a director who would be the occupier and once that statutory obligation is discharged, the Inspector of Factories has no choice but to prosecute that notified director only.

Does proviso (ii) to Section 2(n) travel beyond the scope of the main provision or is otherwise violative of Article 14 of the Constitution India?

In Reserve Bank of India Etc. Etc. Vs. Peerless General Finance And Investment Co. Ltd. & Others Etc. Etc. [1987 (1) SCC, 424] dealing with the principles for interpretation of statutes this Court observed:

"Interpretation must depend on the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored.

Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section. each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is its place." (Emphasis supplied) In S. Gopal Reddy Vs. State of Andhra Pradesh [JT 1996(6) 268], to which one of us (Anand,J.) was a party it was observed:

"It is well known rule of interpretation of statutes that the text and the context of the entire Act must be looked into while interpreting any of the expressions used in a statute. The courts must look to the object which the statute seeks to achieve while interpreting any of the provisions of the Act. A purposive approach for interpreting the Act is necessary." {Emphasis supplied} It is in the light of the above settled principles that we shall consider the true scope and intent of Section 2(n) with reference to proviso (ii) thereto within the scheme of the Act. Can Section 2(n) stand without proviso (ii) in the case of a company? What is the true function of proviso (ii) to Section 2(n)?

A proviso to a provision in a statute has several functions and while interpreting a provision of the statute, the Court is required to carefully scrutinise and find out the real object of the proviso appended to that provision. It is not a proper rule of interpretation of a proviso that the enacting part or the main part of the Section be construed first without reference to the proviso and if the same is found to be ambiguous only then recourse may be had to examine the proviso as has been canvassed before us. On the other hand an accepted rule of interpretation is that a Section and the proviso thereto must be construed as a whole each portion throwing

light, if need, be, on the rest. A proviso is normally used to remove special cases from the general enactment and provide for them specially.

A proviso qualifies the generality of the main enactment by providing an exception and taking out from the main provision, a portion, which, but for the proviso would be a part of the main provision. A proviso must, therefore, be considered in relation to the principal matter to which it stands as a proviso. A proviso should not be read as if providing something by way of addition to the main provision which is foreign to the main provision itself.

Indeed, in some cases, a proviso, may be an exception to the main provision though it cannot be inconsistent with what is expressed in the main provision and if it is so, it would be ultra-vires of the main provision and struck down. As a general rule in construing an enactment containing a proviso, it is proper to construe the provisions together without making either of them redundant or otiose. Even where the enacting part is clear, it is desirable to make an effort to give meaning to the proviso with a view to justify its necessity.

While dealing with proper function of a proviso, this Court in The Commissioner of Income-Tax. Mysore & Ors. Vs. The Indo Mercantile Bank Ltd. & Ors. [AIR 1959 (SC), 713] opined:

"The proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment. Ordinarily it is foreign to the proper function of a proviso to read it as providing something by way of an addendum or dealing with a subject which is foreign to the main enactment."

This view has held the field till date.

Let us now examine Proviso (ii) to Section 2(n) to determine whether it is inconsistent with or beyond the main provision of Section 2(n).

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 to 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 alongwith proviso (ii). The definition of an occupier under Section 2(n) is of general application and different situations have been covered by the legislature only in different provisos appended to Section 2(n). 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 alongwith 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.

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' for obtaining the licence or seeking renewal of the licence of the factory and, therefore, the option to 'select' the director who would be 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 under Section 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.

In keeping with the aim and object of the Act which is essentially to safeguard the interests of workers, stop their exploitation, and take care of their safety, hygiene and welfare at their place of work, numerous restrictions have been enacted in public interest in the Act. Providing restrictions in a Statute would be a meaningless formality unless the statute also contains a provision for penalty for the breach of the same. No restriction can be effective unless there is some sanction compelling its observance and a provision for imposition of penalty for breach of the obligations under the Act or the rules made thereunder is a concomitant and necessary incidence of the restrictions. Such a provision is contained in Section 92 of the Act, which contains a general provision for penalties for offences under the Act for which no express provision has been made elsewhere and seeks to lay down uniform penalty for all or any of the offences committed under the Act. The offences under the Act consist of contravention of (1) any provision of the Act; (2) any rules framed thereunder; and (3) any order in writing made thereunder. It comprises both acts of omission and commission. The persons punishable under the Section are occupiers and managers, irrespective of the question as to who the actual offender is. The provision, is in consonance with the scheme of the Act to reach out to those who have the ultimate control over the affairs of the factory to see that the requirements for safety and welfare of the employees are fully and properly carried out besides carrying out various duties and obligations under the Act. Section 92 contemplates a joint liability of the occupier and the manager for any offence committed irrespective, of the fact as to who is directly responsible for the offence. The fact that the notified/identified director is ignorant about the 'management' of the factory which has been entrusted to a manager or some other employee and is himself not responsible for the contravention cannot absolve him of his liability. The identified / notified director is held vicariously liable for the contravention of the provisions of the Act, the rules made thereunder or of any order made in writing under it for the offender company, which is the occupier of the factory.

Mr. Jain, Mr. Nariman and Mr. Tripathi, appearing for the appellants, however, argued that since Section 92 imposes a liability for imprisonment and/or fine, both on the occupier (the notified director) and the manager of the factory, jointly and severally, for the contravention of any of the provisions of the Act or any rule made thereunder or of any order in writing given thereunder, irrespective of the fact whether the occupier (the notified director) or manager, had any mens-rea in respect of that contravention or that the contravention was not committed by him or was committed by any other person in the factory without his knowledge, consent or connivance, it is an unreasonable restriction. Learned counsel argued that in criminal law, the doctrine of vicarious liability is unknown and if a director is to be punished for some thing of which he is not actually guilty, it would violate his fundamental right as enshrined in Article 21 of the Constitution. It was urged that on account of advancement in science and technology, most of the companies, appoint professionally qualified men to run the factories and nominate such a person to be the 'occupier' of the factory and make him responsible for proper implementation of the provisions of the Act and it would, therefore, be harsh and unreasonable to hold any director of the company, who may be wholly innocent, liable for the contraventions committed under the Act etc. when he may be totally ignorant of what was going on in the factory, having vested the control of the affairs of the factory to such an officer or employee, by ignoring the liability of that officer or employee. The argument is

emotional and attractive but not sound.

The offences under the Act are not a part of general penal law but arise from the breach of a duty provided in a special beneficial social defence legislation, which creates absolute or strict liability without proof of any mens rea. The offences are strict statutory offences for which establishment of mens rea is not an essential ingredient. The omission or commission of the statutory breach is itself the offence. Similar type of offences based on the principle of strict liability, which means liability without fault or mensrea, exist in many statutes relating to economic crimes as well as in laws concerning the industry, food adulteration, prevention of pollution etc. In India and abroad. 'Absolute offences' are not criminal offences in any real sense but acts which are prohibited in the interest of welfare of the public and the prohibition is backed by sanction of penalty. Such offences are generally knows as public welfare offences. A seven Judge Bench of this Court in R.S. Joshi Vs. Ajit Mills [AIR 1977 (SC), 2279, at page 2287] observed :

> "Even here we may reject the notion that a penalty or a punishment cannot be cast in the form of an absolute or no-fault liability but must be proceeded by mens rea. The classical view that ' no mens rea no crime' has long ago been eroded and several laws in India and abroad, especially regarding economic crimes and departmental penalties, have created severe punishments even where the offences have been defined to exclude mens rea. Therefore, the contention that Section 37(1) fastens a heavy liability regardless or fault has no force....."

What is made punishable under the Act is the 'blameworthy' conduct of the occupier which resulted in the commission of the statutory offence and not his criminal intent to commit that offence. The rule of strict liability is attracted to the offences committed under the Act and the occupier is held vicariously liable alongwith the Manager and the actual offender, as the case may be. Penalty follows actus reus, mens-rea being irrelevant.

As already noticed, where the company owns a factory it is the company which is the occupier, but, since company is a legal abstraction without a real mind of its own, it is those who in fact control and determine the management of the company, who are held vicariously liable for commission of statutory offences. The directors of the company are, therefore, rightly called upon to answer the charge, being the directing mind of the company. Dealing with the question of vicarious liability of the directors for offences committed by a company, the following observations of Lord Diplock in Tesco Supermarkets Ltd. V. Nattrass [(1972) AC, 153], are useful :

> "In my view, therefore, the question: what natural persons are to be treated in law as being the company for the purpose of acts done in the course of its business, including the taking of precautions and the exercise of due diligence to avoid the commission of a criminal offence, is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company. This text is in conformity with the classic statement of Viscount Haldane, Lord Chancellor, in Lennard's

Carrying Company Ltd. Vs. Asiatic Petroleum Company Ltd."

{Emphasis supplied} The passage of Viscount Haldane, Lord Chancellor, in Lennard's Carrying Company Ltd. v. Asiatic Petroleum Company Ltd. [(1915) AC 705], referred to by Lord Diplock, is as follows :

> My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that person has an authority co-ordinate with the board of directors given to him under the articles of association....." We are in complete agreement with the above view propounded by Lord Diplock and Viscount Haldane, Lord Chancellor and hold that under the Act only one of the directors, the directing mind and will of the company, its alter ego, can be nominated as an occupier for the purposes of the Act.
>
> The object of the Act would stand defeated if for the commission of strict offences, the identified director, as the deemed occupier of the factory, is not held vicariously liable. An argument similar to the one raised before us regarding the harshness of the provision insofar as an "innocent" director is concerned, was also canvassed in M.C. Mehta's case (supra). We may excerpt that portion which formulates the question and furnishes the answer :
>
> "So far as the undertaking to be obtained from the Chairman and Managing Director of Shriram is concerned it was pointed out by Shriram that Delhi Cloth Mills Ltd.
>
> which is the owner of Shriram has several units manufacturing different products and each of these units is headed and managed by competent and professionally qualified persons who are responsible for the day to day management of its affairs and the Chairman and Managing Director is not concerned with day to day functioning of the units and it would not therefore be fair and just to require the Chairman and Managing Director to give an undertaking that in case of death or injury resulting on account of escape of chlorine gas, the Chairman and Managing Director would be personally liable to pay compensation. We find it difficult to accept this contention urged on behalf of Shriram. We do not see any reason why the Chairman and/or Managing Director should not be required to give an undertaking to be personally liable for payment of compensation in case of death or injury resulting on account of escape of chlorine gas."
>
> We, therefore, find no hesitation in rejecting the argument of learned counsel for the appellants.

It deserves a notice that under the Act, the legislature has itself taken care to dilute the rigor of Section 92 by providing an exception to the strict liability rule by laying down a third party procedure in Section 101 of the Act which reads :

101. Exemption of occupier of manager from liability in certain cases.- Where the occupier or manager of a factory is charged with an offence punishable under this Act, he shall be entitled, upon complaint duly made by him and on giving to the prosecutor not less than three clear days notice in writing of his intention so to do, to have any other person whom he charges as the actual offender brought before the Court at the time appointed for hearing the charge; and if, after the commission of the offence has been proved, the occupier or manager of the factory, as the case may be, proves to the satisfaction of the court-

(a) that he has used due diligence to enforce the execution of this Act, and

(b) that the said other person committed the offence in question without his knowledge, consent or connivance,-

that other person shall be convicted of the offence and shall be liable to the like punishment as if he were the occupier or manager of the factory, and the occupier or manager, as the case may be, shall be discharged from any liability under this Act in respect of such offence :

Provided that in seeking to prove as aforesaid, the occupier or manager of the factory, as the case may be, may be examined on oath, and his evidence and that of any witness whom he calls in his support shall be subject to cross- examination on behalf of the person he charges as the actual offender and by the prosecutor :

Provided further that, if the person charged as the actual offender by the occupier or manager cannot be brought before the Court at the time appointed for hearing the charge, the Court shall adjourn the hearing from time to time for a period not exceeding three months and if by the end of the said period the person charged as the actual offender cannot still be brought before the Court, the Court shall proceed to hear the charge against the occupier or manager and shall, if the offence be proved, convict the occupier or manager." This section which lays down "third party procedure" as a defence, is in a way an exception to the general rule and enables the occupier or the manager of the factory, to extricate himself from punishment by establishing that the actual offender is someone else and giving satisfactory proof of facts as are contemplated by Section 101 (a) & (b).

The principle underlying Section 101 may well be gathered from the following observations of Phillimore J. in Ward v. Smith [1913(3)K.B. 154], while dealing with a somewhat similar provision in England, the learned Judged said :

A prima facie liability is imposed upon the occupier or manager from which however he can extricate himself; otherwise he remains liable. The scheme of the Act is first to find the de facto employer. An information may be laid against the occupier. His way of escape is provided for by this section. He may set up a defence not unlike the defence of warranty which the seller of food may set up under the English Sale of Food and Drugs Act. He may show that the offence was not committed by his fault. To do this he must bring the real offender before the court." Prof. Glanville Williams in his "Text Book on Criminal Law" (1978 Edn.), while dealing with exceptions to the strict liability rule opined that the principle of strict liability may be modified by the statute itself and further that the statutes, generally speaking, contain two main types of excuses (i) the third party procedure and (ii) the no-negligence defence. Prof. Williams observes at page 954 :

"As to the first, some penal statutes provide that when a charge is brought under them the defendant may bring in any other person (e.g. a supplier) to whose act or default he alleges that the contravention was due, and shift the blame to him. The defence is sometimes called a "passing on" defence. The most important examples are in the Shops Act 1950 (s.113), the Medicines Act 1968 (s.121) (this Act replacing the provisions of the 1955 Act with regard to drugs), the Weights and Measures Act 1963 (s.27), and the Factories Act 1961 (s. 161).

The 'passing on' defence provided in Section 101 of the Act is an accepted form of an exception to the principle of strict liability but its benefit would be available only when the requirements of that Section are fully complied with and the Court is satisfied about the proof of facts as are contemplated by clauses (a) and (b) of Section 101.

The provisions of Section 101 are almost identical to the provisions of Section 71 of the Factories Act prior to its amendment, with the difference that under Section 101, a provision for 3 days advance notice to the prosecutor has been added. Under Section 101, after a complaint is made by the Inspector of Factories against the manager or occupier under Section 92 of the Act for contravention of any of the provisions of the Act, the manager or occupier is entitled to complain against the actual offender before the Court and if he does so, the actual offender is given a notice and brought before the court and the trial then proceeds against both the persons complained against, because the Section contemplates both sets of complaints (one filed by the Inspector of Factories and the other by the manager or the occupier) and both the accused (one as named by the Inspector of Factories and the other as named by the Manager or occupier) being brought before the Court at the same time. The carriage of proceedings is with the original complainant (Inspector of Factories) and the onus also lies on him of proving that an offence has been committed. Both the parties complained against (one by the Inspector and the other by the Manger or occupier) are entitled to cross- examine the prosecution witnesses at this stage and also lead evidence to disprove the charge. If the prosecution fails to prove the offence,

both of them would be acquitted. However, if the offence is proved then the trial court shall record an order to that effect and the occupier or manager shall be afforded an opportunity to extricate himself from the liability provided he can give satisfactory proof of the facts required by Section 101 (a) and (b). The onus of proof, at that stage, is shifted to the manager or the occupier. He is entitled to call evidence as well as to give evidence himself. The alleged actual offender would have a right to cross-examine the manager or the occupier as the case may be. He would also be entitled to call evidence. Even where the occupier establishes that the actual offender is the person named by him, he must still prove to the satisfaction of the Court, that he had used due diligence to enforce the execution of the act and that the said other person committed the offence in question without his knowledge, consent or connivance.

In State of Gujarat Vs. Kansara Manilal [AIR 1964 (SC), 1893 at 1897] while dealing with the provisions of Section 101 of the Act, this Court opined :

"Where an occupier or a manager is charged with an offence he is entitled to make a complaint in his own turn against any person who was the actual offender and on proof of the commission of the offence by such person the occupier of the manager is absolved from liability. This shows that compliance with the preemptory provisions of the Act is essential and unless the occupier or manager brings the real offender to book he must bear the responsibility. Such a provision largely excludes the operation of S. 117 in respect of persons guilty of a breach of the provisions of the Act. It is not necessary that mens rea must always be established as has been said in some of the cases above referred to. the responsibility exists without a guilty mind. An adequate safeguard, however, exists in Section 101 analysed above and the occupier and manager can save themselves if they prove that they are not the real offenders but who, in fact is."

This judgment has been noticed with approval by a three Judge Bench of this Court in Maneklal Jinabhai Kot Vs. State of Gujarat & Ors. [1967 (2) SCR, 507]. We are in respectful agreement with the view that an adequate safeguard has been provided under Section 101, under which, for circumstances mentioned therein, the occupier or manager can absolve himself from the liability if he can establish to the satisfaction of the Court that he is not the real offender but it is the other person charged by him who deserves to be punished and that he had been diligent and further that the offence was not committed with his knowledge, consent or connivance.

Mr. Jain, learned senior counsel, however, argued that since Section 101 requires that the actual offender must be brought before the Court at the time appointed for hearing the charge or at the latest within a period of three months thereafter and if by the end of that period the actual offender cannot be brought before the Court, the Court would proceed to hear the charges against the occupier or the manager and convict him if the offence is proved, renders the benefit of Section 101 as illusory. We find ourselves unable to agree. The scheme of Section 101 being that the occupier or manager should be relieved from liability only if the actual offender could be brought to Court, the

presence of the actual offender on whom the burden has been shifted by the occupier or the manager would be necessary, at the time of trial and a period of three months has been prescribed by the Legislature within which the actual offender should ordinarily be brought before the Court by the process of law. If that cannot be done, the trial against the occupier or the manager as the case may be, cannot be allowed to be protracted indefinitely and we find it difficult to see how any fault can be found with this provision.

Thus, we are of the opinion that proviso (ii) to Section 2(n) when considered in relation to Section 92 of the Act does not offend Article 21 of the Constitution of India either.

That Section 92 is a perfectly valid piece of legislation insofar as it makes the occupier or manager of a factory guilty of an offence for contravention of any of the provisions of the Act or the rules made thereunder, even if the actual contravention may not have been committed by the occupier or the manager. is not disputed or doubted before us and, therefore, we are unable to appreciate how the provision contained in proviso (ii) to Section 2(n) can render the said proviso read with Section 92 invalid or unreasonable or how it offends Article 19(1)(g) of the Constitution by defining an occupier to be only the director of the company.

Article 19(1)(g) of the constitution guarantees to a citizen the right to practice any profession or to carry on any occupation, trade or business. This right, however, is subject to Clause (6) of Article 19 which lays down that nothing in sub-Clause (g) of Article 19(1) shall affect the operation of any existing law insofar as it imposes or prevents the State from making any law imposing in the interest of the general public reasonable restrictions on the exercise of the right. Clause (6) of Article 19 is intended to strike a balance between individual freedom and social control. Keeping in view the object of the Act, we must look to the reasonableness of the provision requiring the nomination of a director as the occupier of the factory under Section 7 of the Act, with a view to determine whether proviso (ii) to Section 2(n) has a rational nexus with the object which the legislature seeks to achieve. It was, as already observed, with a view to secure proper and effective enforcement of the provisions of the Act and the Rules made thereunder, that the legislature considered it appropriate to fasten the liability for proper implementation of the Act on one of the directors by insisting that in the case of a company, which owns the factory, one of the directors shall be deemed to be the occupier for all purposes, including prosecution and penalty in respect of offences committed under the Act. The Legislature has attempted to plug the loopholes, which existed earlier and enabled the directors to escape their liability by passing on the buck, as they say, to an employee. It is much too obvious that when top persons of the company are made conscious of their responsibilities and duties for the implementation of the safety and welfare measures in a factory and to carry out the duties prescribed under the Act, at the pain of punishment in case they choose to overlook, there are much greater chances that proper care would be taken for maintenance of the factory, particularly in regard to the safety measures and welfare of workers.

There is, therefore, nothing unreasonable in fixing the liability on a director of a company and making him responsible for compliance with the provisions of the Act and the rules made thereunder and laying down that if there is contravention of any of the provision of the Act or an offence is committed under the Act, the notified director, and in the absence of the notification, any

one of the directors of the company, shall be prosecuted and shall be liable to be punished as the deemed occupier. "A law has to be judged for its constitutionality by the generality of cases it covers, not by the freaks and exceptions it martyrs." [See AIR 1977 S.C. 2279 (supra)].

The restriction imposed by proviso (ii) if at all, it may be called a restriction, has, a direct nexus with the object sought to be achieved and is, therefore, a reasonable restriction within the meaning of clause (6) of Article 19. Proviso (ii) to Section 2(n) is thus, not ultra-vires Article 19(1)(g) of the Constitution.

Thus, from the above discussion, it follows that the directions given by the Chief Inspector of Factories to the writ petitioners and the appellants herein to the effect that only a director of the company could file an application for renewal of the factory licence (or for grant of factory licence), as occupier of the factory and that no other employee could make such an application even if nominated by the company as an occupier of the factory, suffers from no infirmity whatsoever.

To sum up our conclusions are :

(1) In the case of a company, which owns a factory, it is only one of the director of the company who can be notified as the occupier of the factory for the purposes of the Act and the company cannot nominate any other employee to be the occupier of the factory:

(2) Where the company fails to nominate one of its directors as the occupier of the factory, the Inspector of Factories shall be at liberty to proceed against any one of the directors of the company, treating him as the deemed occupier of the factory, for prosecution and punishment in case of any breach or contravention of the provisions of the Act or for offences committed under the Act.

(3) Proviso (ii) to Section 2(n) of the Act is intravires the substantive provision of Section 2(n) of the Act;

(4) Proviso (ii) to Section 2(n) is constitutionally valid and is not ultra-vires Articles 14, 19(1)(g) and 21 of the Constitution of India;

(5) The law laid down by the High Courts of Bombay, Orissa, Karnataka, Calcutta, Guwahati and Madras is not the correct law and the contrary view expressed by the High Courts of Allahabad, Madhya Pradesh, Rajasthan and Patna is the correct enunciation of law in regard to the ambit and scope of proviso (ii) to Section 2(n) of the Act.

All the writ petitions and the appeals by special leave consequently fail and are hereby, dismissed. We, however, leave the parties to bear their own costs.