Supreme Court of India
Indian Oil Corporation Ltd vs Chief Inspector Of Factories And ... on 14 July, 1998
Bench: G.T. Nanavati, S.P. Kurdukar

CASE NO.:
Appeal (civil) 3237 of 1998

PETITIONER:
INDIAN OIL CORPORATION LTD.

RESPONDENT:
CHIEF INSPECTOR OF FACTORIES AND ORS. ETC,

DATE OF JUDGMENT: 14/07/1998

BENCH:
G.T. NANAVATI & S.P. KURDUKAR

JUDGMENT:

JUDGMENT 1998(3) SCR 598 The Judgment of the Court was delivered by NANAVATI, J. Leave granted. Heard learned counsel for the parties.

A short but an interesting question of Jaw arises for consideration in these appeals. The question is : who is to be deemed 'occupier' of a factory of a government company incorporated under the Indian Companies Act? If the government company is to be treated like any other company then according to clause (ii) of the first provision to Section 2(n) of the Factories Act, 1948 any one of the directors of that company is deemed to be the occupier; but, if its factory is considered as a factory owned or controlled by the Government as provided by clause (iii) of the proviso the person appointed to manage the affairs of the factory by the Government is to be deemed the occupier.

The appellant, Indian Oil Corporation Limited, is a government company as defined by Section 617 of the Companies Act. It is almost wholly owned and controlled by the Government. It is, inter alia, engaged in the supply and distribution of petroleum and petroleum products including L.P.G. In order to ensure an effective and efficient supply system it is required to establish and maintain storage facilities at many places in the country. At Namkum, in Ranchii District, it already had large storage facility, With the object of increasing storage capacity at Numkum it established a new storage unit in 1992 after obtaining approval of the Central Government. As storage facilities are also covered by the definition of 'factory' as defined by the Factories Act, the Depot Manager posted at the Namkum Depot made an application on 10.4.92 for obtaining a licence for the new unit. He also made ah application on 30.12.91 for renewal of the licence of the existing unit. While granting the licence earlier, for the existing unit, the Inspector of Factories had recognized the Depot Manager as the 'occupier' and the occupancy certificate; etc. were issued in his name. But this time, the new Inspector of Factories, by his letter dated 28,4.92 refused to grant the licence showing Depot Manager as the occupier, on the ground that Indian Oil Corporation is a company and in case of a company any one of the directors only can be deemed to be the occupier. He directed the appellant to submit proper applications duly signed by one of the directors of the company. In view of this refusal the appellant filed G.W.J.C. No. 443 of 1991 in the Patna High Court. On 11.5.92 the

Corporation wrote to the Ministry of Petroleum and Natural Gas apprising it of the stand taken by the Inspector of Factories at Ranchi and seeking its guidance in the matter. On 26.5.92 the Inspector of Factories passed an order granting permission to the Corporation to start pumping of oil and to do other allied processes in its new unit at Namkum on certain conditions and on temporary basis till the disposal of the said writ petition. In that order also he reiterated that he would recognise only the Board of Directors of the Corporation in general and Director (Marketing) in particular as the occupier of the factory and not the local Depot Manager. On 2.7.92 the Government of India, in the Ministry of Petroleum and Natural Gas; wrote to the Chief Inspector of Factories that the Ministry had already issued notifications declaring the unit incharge as the occupier for the purpose of the Act. He was accordingly advised to recognise the officer incharge of the concerned depot as the occupier of that factory. Rejecting this request the Inspector of Factories reiterated the stand taken by him and refused to recognise the officer incharge as the occupier. Thereupon the Corporation filed a more comprehensive petition, C.W.J.C. No. 2456 of 1992 challenging the action of the Inspector of Factories.

Before the High Court two questions were raised on behalf of the appellant One was whether in the case of a company one of the directors of the company only can be recognised as an occupier of the factory owned by it and the second was whether clause (iii) would apply to the factories of the Corporation and it is open to the Central Government to nominate any person other than the director as the occupier. Following the decision of this Court in J. K. Industries Limited and others v. The Chief Inspector of Factories and Boilers and Others, [1996] 6 SCC 665, wherein it is held that in the case of company, which owns a factory, it is only one of the directors of the company who can be notified as the occupier of the factory for the purposes of the Factories Act and the company cannot nominate any other employee as the occupier of the factory, the High Court answered the first question accordingly. In view of this decision the learned Attorney General appearing for the Corporation has not raised that point before us: On the second point, the High Court held that proviso (ii) to Section 2(n) would apply to the storage depots at Namkun. It gave the following three reasons for taking that view : (1) The storage depots are owned by the company and not by Central Government, though the company itself is owned, to a very large extent by the Central Government, (2) proviso (ii) to Section 2(n) is applicable to all the companies as it does not make any distinction between a private company and a Government owned company, and (3.) the Depot Manager has not been appointed by the Central Government but by the company. It, therefore, dismissed both the petitions.

Pressing only the second point the learned Attorney General submitted that though Indian Oil Corporation is a Government company and, therefore, a company as contemplated by clause (ii) of the proviso to Section 2(n), its factories would properly fall within the purview of clause (iii) inasmuch as the Corporation is in reality owned by the Central Government and almost all its affairs, except the day to day affairs, are controlled by the Central Government. He submitted that 91.5 per cent of its share capital is held by the Government. 5 per cent by its employees and the rest by the financial institutions. The Government officers, acting for and on behalf of the President, had, as initial subscribers, applied for the formation and incorporation of the company. The articles of association disclose that the Central Government has all-pervasive control as regards increase or reduction of the capital of the corporation, its borrowing powers, appointment and removal of its

Chairman and directors, powers of its directors and working of the corporation itself. Under Article 144 the President has been given the power to call for any returns, accounts and other information with respect to the papers and activities of the company and to issue such directives or instructions as may be considered necessary in regard to the financing. conduct of business and affairs of the corporation. He also drew our attention to Section 2(n) of the Act and submitted that the main part of the definition of the word "occupier" itself makes it clear that the person who has the ultimate control over the affairs of the factory is to be regarded as the occupier of the factory. He submitted that obviously in case of a company, though it does not ordinarily look after day to day affairs of its factories, the ultimate control is that of the company and, therefore, the directors in whom the power to manage the affairs of the company vest are deemed to be (he occupier of the factory. He further submitted that if the ultimate control is the litmus test for finding out who should be regarded as occupier of the factory, as held by the this Court in the case of J.K. Industries (Supra), in the case of the appellant-corporation it will have to be held that the ultimate control over the affairs of all the factories of the Corporation is really of the Central Government, and, therefore, all the factories of the Corporation should be regarded as factories owned and controlled by the Central Government. As there is a special provision governing factories owned or controlled by the Central Government the general provision made with respect the companies, will not apply.

On the other hand, me learned counsel for the contesting respondents Supported the judgment of the High Court on the first two grounds given by it and further contended that on a correct and harmonious interpretation of clauses (if) and (iii) of the first proviso to Section 2(n) it should be held that clause (iii) applies only to those factories which are run by the government departmentally. He submitted that the appellant-Corporation is just like any other company, has its own share capital, has a Board of Directors in whom the power to manage the affairs of the company vests and profit and loss made by it would be its own. Thus it is not merely a separate legal entity but is quite independent and different from the government. He also submitted that though the Government has vast powers to control the affairs of the Corporation yet the factories of the Corporation are run by the Corporation and its employees and not by the concerned Government department and the employees working therein.

Section 2(n) of the Act which defines the word 'occupier' reads as under.

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

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 of the directors shall be deemed to be occupier;

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

factory by the Central Government, the State Government or the local authority, as the case may be shall be deemed to be the occupier;

Second proviso to Section 2(n) is not set out, as it is not necessary to refer to it.

Prior to its amendment in 1987 section 2(n) read as under:

"2(n) 'occupier of a factor, 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"

Before 1987 Section 2(n) was required to be read with Section 100 of the Act which read as under :

"Section 100 Determination of occupier in certain cases;

(1) Where the occupier of a factory is a firm or other association of individuals, any one of the individual partners or members there of 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 can celling 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 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:

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.

(3) .....

While amending Section 2(n) in 1987 a significant change was made by the legislature. Section 100 was deleted and instead in Section 2(n) itself a stricter provision was made by introducing the first proviso, in J.K. Industries Limited (supra) this Court had an occasion to consider the history of these provisions and the objects and reasons why changes were made therein from time to time. In

that context, the Court observed that "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.....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 year 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..... 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." These observations were made by this Court while considering constitutional validity and correct interpretation of clause (ii) of the first proviso to Section 2(n). We have referred to the same as they are also relevant for construing the true ambit and width of clauses (ii) and (iii) of that provision.

If ultimate control is the litmus test, then as contended by the learned Attorney General, it is necessary to find out whether the Central Government has the ultimate control over the affairs of the factories of the corporation or it is the corporation itself which possesses such control.

In Som Prakash Rekhiv. Union of India Anr.r [1981] I SCC 449 this Court has held that corporations are one species of legal persons invented by the law and invested with a varieties of attributes so as to achieve certain purposes sanctioned by the law. The characteristics of corporations, their fights and liabilities, functional autonomy and juristic s'tatus, are juris prudentiauy recognised as of a distinct entity even where such corporations are State agencies or instrumentalities. But merely because a company or other legal person has functional and jural individuality for certain purposes and in certain areas of law, it does not necessarily follow that for the effective enforcement of fundamental rights under our constitutional scheme, court should not scan the real character of that entity; and if it is found to be a mere agent or surrogate of the State, in fact owned by the State, in truth controlled by the State and in effect an incarnation of the State, constitutional lawyers must not blink al these facts and frustrate the enforcement of fundamental rights despite the inclusive definition of Article 12 that any authority controlled by the Government of India is itself State. The true test is functional, not how the legal person is born but why it is created. Apart from discharging functions or doing business as the proxy of the State, wearing the corporate mask there must be an element of ability to affect legal relations by virtue of power vested in it by law. After taking into consideration the fact that control by the government over the Corporation is writ large in the Act and in the factum of being a Government company and the circumstances under which the Bharat Petroleum Corporation Limited was made a Corporation, this Court further held that they emphasise the fact that if "is not a mere company but much more than that and has a statutory flavour in its operation and functions, in its powers and duties and in its personality itself, apart from being functionally and administratively under the thumb of the government. It was also observed that a "commercial undertaking although permitted to be run under our constitutional scheme by government, may be better managed with professional skills and on business principles, guided, of course, by social goals, if it were administered with commercial flexibility and celerity free from departmental rigidity, slow motion procedures and hierarchy of officers;..... Welfare States like

ours called upon to execute many economic projects readily resort to this resourceful legal contrivance because 'of "its-practical advantages without a wee bit of diminution in ownership and control of the undertaking. The true owner is the State, the real operator is the State and the effective controllerate is the State and accountability for its actions to the community and to Parliament is to the State, ,.... The core fact is that the Central Government, though this provision, chooses to make over, for better management, its own property to its own off spring. A Government company is a mini-incarnation of government itself, made up of its blood and bones and given corporate shape and status for defined objectives, not beyond."

Though in a different context this Court in Mahabir Auto Stores and Others v. Indian Oil Corporation and others, [1990] 3 SCC 752 held that the Indian Oil Corporation which is a statutory body incorporated under the Companies Act, is an organ of the State or an instrumentality of the State, The relevant thing to be noted, is that this Court while so holding took note of the fact that the corporation is subject to the policies, directions, instructions and guidelines issued by the Ministry of Energy, Again in J.K. Industries Ltd. this Court, while dealing with Section 2(n), as amended by Act 20 of 1987 emphasised the use of the word "ultimate" and after referring to the decision in John Donald Mackenzie v. Chief Inspector of Factories, AIR (1962) SC 135l observed that the jaw 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 haying 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 fact. It is also held therein that the deeming provision made in proviso (ii) does not override the substantive provision of Section 2(n) but clarifies it.

The above discussion fully supports the contention of the learned Attorney General that for the purpose of Section 2(n) what is to be seen is who has the 'ultimate control' over the affairs of the factory. Relevant provisions regarding establishment of the corporation and its working leave no doubt that the ultimate control over all the affairs of the corporation, including opening and running of factories, is with the Central Government. Acting through the corporation is only a method employed by the Central Government for running its petroleum industry. In the context of Section 2(n) it will have to be held that all the activities of the corporation are really carried on by the Central Government with a Corporate mask.

It is, therefore, not possible to agree with the contention raised on .behalf of the contesting respondents that the ultimate control over the factories of the Corporation lies with the Corporation and not with the Central Government, though it is true as contended by the learned counsel appearing for them that the Corporation is a legal entity, has a separate and independent existence of its own and the right to manage the affairs of the Corporation including the right to set up and run the factories vests in the Board of Directors. In our opinion, it will not be proper to adopt this narrow approach while construing the scope and ambit of clauses (ii) and (iii) of the first proviso to Section 2 (n). The approach which deserves to be adopted is one which would achieve the object of the provision and, therefore, the same approach which was adopted by this Court in Som Prakash Rekhi's case, (supra) is to be preferred Over the narrow approach which is the basis of the

contention raised on behalf of the contesting respondents.

Apart from the main part of Section 2(n), the First proviso also indicates that the Legislature intended that the person having ultimate control over the affairs of the factory has to be regarded as occupier of the factory. The proviso to the Section is not in the nature of an exception. In order to avoid any ambiguity, to plug loopholes and to seal the escape routes a deeming provision has been made in a mandatory form. In the case of a firm obviously the partners of the firm have ultimate control over the affairs of the partnership. In case of other type of association the members thereof will have such control. In the case of a company the directors have the ultimate control, as the power to manage the affairs of the company vests in the Board of Directors, What clauses (i) and (ii) of the proviso provide is that they shall be deemed to be 'occupiers'. Thus they merely restate me position which is obvious even otherwise. The position of the government and the local authority is quite different from that of a firm or an association or a company not only with respect to the person who can be said to be in ultimate control but also with respect to the object for which factory is set up. In a democratic set-up of Government, it may not be possible to say with certainty as to who is having the ultimate control. In a welfare state, the government does not carry on such activity for its own profit or benefit but for the benefit of the people as a whole. Moreover, it is the government which looks after the successful implementation of the provisions of the Factories Act and, therefore, it is not likely to evade implementation of the beneficial provisions of the Factories Act; That appears to be the reason why the legislature though it fit to make a separate provision for the Government and the local authorities. Ordinarily, for running the factories owned or controlled by the Central Government or any State Government, or any local authority, a person or persons would be appointed by it to manage the affairs of the factory, because the Government or the local authority as a whole would not run the factory, Therefore, the legislature appears to have provided that in case of a factory owned or controlled by the Central Government, the State Government or the local authority the person or persons appointed to manage the affairs of the factory by the Central Government, State Government or the local authority, as the case may be, shall be deemed to be the occupier. Therefore, if it is a case of a factory in fact and in reality owned or controlled by the Central Government or the State Government or any local authority then in case of such a factory the person or persons appointed to manage the affairs of the factory shall have to be deemed to be the occupier, even though for better management of such a factory or factories a corporate form is adopted by the government.

Before 1987, when Section 100 was the governing provision, any one of the individual partners of a firm or any one of the members of association of individuals could be punished under sub-section (I) thereof for any offence for which the occupier of the factory was punishable. The firm or association was given an option to nominate one of its members as the occupier of the factory and if such an option was exercised by giving a notice to the Inspector then he alone was to be deemed to be the occupier of the factory for the said purpose. Under sub-section (2) if the occupier of the factory was a company then any one of the directors thereof could be prosecuted and punished. A similar option was available to the company, as in the case of a firm and an association of individuals. It is significant to note that it was by way of a proviso to sub-section (2) which dealt with case of a company that the provision was made for deciding who should be deemed to be the occupier of a factory in case it belonged to the Central Government or any State Government or any

local authority and a similar option is made available to main. The said proviso though enacted as an exception to the main part of sub-section (2) is truly by way of a separate provision made in the case of a factory belonging to the Central Government or any State Government or any local Authority. While making the amendment in 1987 in Section 2(n) and deleting Section 100 at the same time the Legislature made the proviso to sub-section (2) of Section 100 an independent proviso to Section 2(n). That also clearly indicates the intention of the Legislature that it wanted to make a separate provision for deeming who should be the occupier of a government factory.

For the aforesaid reasons we hold that as the factories run by the appellant-corporation are effectively and really owned and controlled by the Central Government they fall within the purview of clause (Hi) and not clause (ii) of the first proviso to Section 2 (n). In our opinion, the High Court was wrong in taking a contrary view. We, therefore, allow these appeals, set aside the judgment and order passed by the High Court to the extent indicted above and direct Respondents Nos. 1 and 2 to accept the persons appointed by the Central Government of manage the affairs of the factories at Namkum as the occupiers of those factories for the purposes of Section 2(N) of the Factories Act. In view of the facts and circumstances of the case, we direct the parties to bear their own cost.