

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.

FRIDAY, THE 18TH DAY OF FEBRUARY 2022 / 29TH MAGHA, 1943

CRL.MC NO. 6040 OF 2016

[AGAINST S.T.NO. 4719 OF 2014 PENDING ON THE FILES OF JUDICIAL
FIRST CLASS MAGISTRATE COURT, KOLENCHERY]

PETITIONER/ACCUSED:

SABU M. JACOB
AGED 53 YEARS
S/O.JACOB, AGED 53 YEARS,MECKAMKUNNEL HOUSE, VILANGU
KARA,KIZHAKKAMBALAM VILLAGE, VILANGU.P.O.,ERNAKULAM
DISTRICT.683 561, MANAGING DIRECTOR, KITEX GARMENTS
LIMITED(PROCESSING), KIZHAKKAMBALAM,
ERNAKULAM DISTRICT-683 561.

BY
SR.ADVOCATE SRI.GEORGE POONTHOTTAM
ADV. SMT.NISHA GEORGE

RESPONDENTS/COMPLAINANT & STATE:

- 1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,HIGH COURT OF KERALA,
ERNAKULAM,PIN CODE-682 031.
- 2 THE INSPECTOR OF FACTORIES AND BOILERS
GRADE-I, PERUMBAVOOR, HEAD QUARTERS ALUVA,ERNAKULAM
DISTRICT.683 101.

BY SRI.SUDHEER GOPALAKRISHNAN, PUBLIC PROSECUTOR

THIS CRIMINAL MISC. CASE HAVING COME UP FOR HEARING ON
03.02.2022, THE COURT ON 18.02.2022 PASSED THE FOLLOWING:

O R D E R

The petitioner is the accused in S.T.No.4719/2014 on the file of the Judicial First Class Magistrate Court, Kolencherry. The aforesaid case was registered on the basis of a complaint submitted by the 2nd respondent, who is the Inspector of Factories and Boilers, Perumbavoor, alleging violation of provisions under sub-section (1) of Section 7A and clauses (b) and (d) of sub-section (2) of Section 7A of the Factories Act, 1948. The violation of rule 81D of the Kerala Factories Rules, 1957 was also alleged. The aforesaid violation attracts the offence under Section 92 of the Factories Act.

2. The sum and substance of the prosecution case is that, the petitioner who is the Managing Director of Kitex Garments Limited failed to ensure, health, safety and welfare of the workers, while they were at work in the factory by providing and maintaining arrangements for the same. It is also alleged that, on account of the said lapses, an accident occurred in the factory on 24.5.2014 at 3 a.m. in which one P.T.Ajeesh died.

3. On the basis of the incident, as per Annexure A-2 order, the Director of Factories and Boilers, Thiruvananthapuram granted sanction for prosecuting the petitioner in his capacity as the Occupier of the factory

above named. On the basis of such sanction, Annexure-A1 complaint was submitted by the 2nd respondent. This Crl.M.C. is filed by the petitioner seeking to quash Annexure-1 complaint and all further proceedings pursuant thereto.

4. Heard Sri. George Poonthottam, the learned Senior Counsel appearing for the petitioner and Sri. Sudheer Gopalakrishnan, the learned Public Prosecutor for the State.

5. The contention put forward by the learned Senior Counsel is that, the prosecution initiated against the petitioner is unsustainable. According to him, the prosecution contemplated under Section 92 of the Factories Act is against the 'occupier' of the premises and in the absence of any specific documents indicating the same, the petitioner who is the Managing Director of the Company, cannot be treated as an occupier. It is also contended that the concept of vicarious liability cannot be attributed to the accused in a criminal prosecution and no person can be implicated in an offence on the basis of the said principle. In this case, merely because of the reason that, he is the Managing Director of the Company, he cannot be implicated as an accused as the same will have

an effect of applying the principles of vicarious liability which is not supported by the principles of law relating to the criminal prosecution. The learned counsel places reliance upon Maksud Saiyed v. State of Gujarat and Others [2008(5)SCC 668], Verma G.N. v. State of Jharkhand and Another [2014(4)SCC 282].

6. On the other hand, the learned Public Prosecutor brought my attention to the statement submitted by the 2nd respondent wherein it was specifically stated that, going by the definition of 'Occupier' as contained in Section 2(n) of the Factories Act, 1948, any of the directors of the Company shall be deemed to be 'Occupier'. By placing reliance upon the said provision, it was pointed out by the learned Public Prosecutor that the prosecution was rightly initiated against the petitioner as he is the Managing Director of the Company. According to the learned Public Prosecutor the deeming provision contemplated under Section 2(n) of the Factories Act is attracted. In these circumstances, he prays for dismissal of the Crl.M.C.

7. Thus, the question arises is as to whether, the prosecution against the petitioner herein by treating him as an 'occupier' of the factory is correct or not ? The fact that, the petitioner is the Managing Director of the

Company is not disputed. The expression "Occupier" is defined under Section 2(n) of the Factories Act, 1948 which reads as follows:

*"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 the occupier;

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

The stipulation in sub-section (ii) of Section 2(n) of the Act clearly provides that, in case of a Company, any one of the directors of the Company shall be deemed to be an 'Occupier'. It is true that, the 'Occupier' is defined as the person who has ultimate control over the affairs of the Company, but the deeming provision as mentioned above is contained in the proviso to the said definition, which extends the liability to one of the directors of the

company. The thrust of the argument of the learned Senior Counsel is that, since the occupier of a factory is a person, who has ultimate control over the affairs of the factory, the person, who can be treated as an 'occupier' is the only person who is having the direct control over the affairs of the factory. The petitioner being the Managing Director of the Company is entrusted with the responsibility to manage the entire institution (Company) and the specific control over the affairs relating to the factory cannot be treated as a matter directly vested upon him.

8. The learned Senior Counsel also places reliance upon Annexure-A3 report of the accident submitted in Form 18 before the 2nd respondent, by the Company. Annexure A3 is submitted pursuant to the accident which is the subject matter of the complaint and the same is dated 24.5.2014. It is pointed out that, in Annexure A3, the name of the occupier is shown as one Sajeev Koshy, Kitex Quarters, Kozhakkambalam. Therefore, it is submitted that, since the Company has already intimated the 2nd respondent that the said Sajeev Koshy is the occupier of the factory, the prosecution ought not to have initiated against the petitioner by invoking the deeming provision under Section 2(n) of the Factories Act, 1948.

9. However, the crucial aspect to be noticed in this regard is that, while considering the question as to who is the 'occupier', Annexure A3 report of the accident cannot be treated as a relevant document. This is particularly because, Annexure A3 accident report which is submitted in form 18 is intended to fulfill the obligation of the factory as contemplated under Rule 123 of the Kerala Factories Rules, 1957. Rule 123(1) of the said Rule mandates that when any accident which results in the death of any person or which results in such bodily injury to any person as is likely to cause his death, or any dangerous occurrence specified in the schedule takes place in a factory, the Manager of the factory shall forthwith send a notice thereof to the authorities concerned. Thus it is evident that, the obligation as contemplated under Rule 123 is upon the Manager of the factory. The expression 'Manager' has been defined under Rule 2(1) of the Kerala Factories Rules as per which the 'Manager' means the person responsible to the occupier for the working of the factory for the purposes of the Act. Thus, it is evident that the Manager is a person responsible to the occupier for the working of the factory. Therefore, the occupier and the manager cannot be the same person. Moreover, the penal proceedings initiated

against the petitioner is for the offence punishable under Section 92 of the Factories Act, 1948 for the violation of the provisions mentioned above. Section 92 of the Act reads as follows:

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

[Provided that where contravention of any of the provisions of Chapter IV or any rule made thereunder or under section 87 has resulted in an accident causing death or serious bodily injury, the fine shall not be less than [twenty five thousand rupees] in the case of an accident causing death, and [five thousand rupees] in the case of an accident causing serious bodily injury.

Explanation:- In this section and in section 94 "serious bodily injury" means an injury which involves, or in all probability will involve, the permanent loss of the use of, or permanent injury to, any limb or the permanent loss of, or injury to, sight or hearing, or the fracture of any bone, but shall not include, the fracture of bone or joint (not being fracture of more than one bone or joint) of any phalanges of the hand or foot.]

Thus, as per the said provision, in respect of contravention of any of the provisions of the Factories Act, prosecution can be initiated against both the occupier and the manager. In this case, the prosecution has been initiated against the occupier. There are no documents produced by him indicating that any person was nominated by the factory, before the authorities concerned, as an occupier, as on the date of occurrence of the accident, which is the cause of action for initiation of prosecution. As far as the name of the person mentioned as occupier in Annexure A3 is concerned, the same is a post accident document and the contents of the same with regard to the name of the occupier specified therein, cannot be treated as valid for the purpose of initiation of prosecution under Section 92 of the Act. In other words, since Annexure A3 is submitted after the occurrence of the accident, it could be possible to name any person as occupier so as to create an escape route for the person who was the real occupier as on the date of accident.

10. Thus it is evident that, as on the date of accident, no documents were submitted before the authorities concerned nominating any person as occupier or intimating the statutory authorities, as the person who is

in ultimate control over the affairs of the factory. In the absence of any such specific nomination or intimation in this regard, in my view, the deeming provision contemplated under Section 2(n) of the Factories Act would come into play. As per the aforesaid provision, any one of the directors of the company can be the occupier of the Company.

11. However, I am conscious of the fact that, a Company can have several directors and it need not necessarily be the Managing Director who can be held responsible as an occupier of the factory. It is a question of fact, which has to be substantiated during the course of trial. The said question cannot be considered in a proceeding of this nature.

12. The learned Senior Counsel by placing reliance upon the judgments referred above, contended that the principles of vicarious liability cannot be imported to criminal jurisprudence and in this case, the petitioner was implicated as an accused, by applying the aforesaid principles on the ground that he is the Managing Director of the Company. However, I am not inclined to accept the said contention. It is true that, the principle of vicarious liability is alien to the criminal jurisprudence

under normal circumstances. However, when the statute prescribes culpability upon a specific person on the basis of the position he is holding in the institution, there is no illegality in implicating such person for the offence alleged. In this case, by virtue of the deeming provision as contained under Section 2(n) of the Act, any of the directors of the Company can be treated as occupier of the Company and in the absence of any other materials indicating nomination or intimation of any person as occupier, the petitioner can be prosecuted by treating him as the occupier of the Company on the strength of the deeming provision mentioned above.

13. The decisions relied upon by the learned counsel for the petitioner cannot be made applicable to the facts and circumstances of the case. The judgment in Maksud Saiyed's case (supra) was rendered by the Hon'ble Supreme Court in respect of the offences punishable under various provisions of the Indian Penal Code where the provision similar to the one contemplated under Section 2(n) of the Factories Act was not there. Therefore, the aforesaid principles cannot be made applicable to this case. The judgment in Verma G.N's case (supra) was rendered by the Hon'ble Supreme Court in Mines Act, 1952 and the Hon'ble Supreme Court was pleased to consider the prosecution

against an agent as defined under Section 18(5) of the Act. The aforesaid provision stipulated criminal liability upon certain specific officers who can be treated as deemed agent and the said persons mentioned therein were:

"i) the official or officials appointed to perform duties of supervision in respect of the provisions contravened;

ii) the manager of the mine;

iii) The owner and agent of the mine;

iv) The person appointed, if any, to carry out the responsibility under sub-section (2):

Provided that any of the persons aforesaid may not be proceeded against if it appears on inquiry and investigation, that he is not prima facie liable."

The Hon'ble Supreme Court noticed that, the petitioner therein who was the Chief General Manager, was not appointed as the officer to perform the duties of supervision in respect of the provisions contravened. The aforesaid conclusion was arrived at by the Hon'ble Supreme Court in view of the fact that the stipulation in the relevant provision necessitated appointment of an officer to perform the relevant duties and therefore in the absence of any document indicating such appointment, the prosecution is bad as against him. However, the stipulation in Section 92 of the Act is relating to

prosecution against the manager and occupier. The term 'occupier' as defined under Section 2(n) of the Act contemplates a provision where any one of the directors of the company can be deemed to be the occupier. The requirement for an appointment as an agent as contemplated under the Mines Act, is not there in the provisions of Factories Act, for treating the director as an occupier, for the purpose of the Act. Therefore, In the absence of any nomination or intimation to the contrary, any of the directors can be prosecuted for the offences. Thus the principles laid down in Verma G.N's case (supra) cannot be made applicable in this case.

14. In such circumstances, I do not find any merit in the contentions put forward by the petitioner, mainly because of the reason that, the question as to whether the petitioner was the occupier even in terms of deeming provision, is a matter to be adjudicated at the time of trial and after evaluating the evidence adduced. This is because, the deeming provision as contemplated under Section 2(n) of the Act is confined to only one of the directors, which would indicate that, the director who is in control of the factory shall be held responsible as an occupier. In the result, this CrI.M.C. is dismissed,

leaving open the said question, as it is to be decided during the course of trial.

Sd/-
ZIYAD RAHMAN A.A.
JUDGE

pkk

APPENDIX OF CRL.MC 6040/2016

PETITIONER'S ANNEXURES :

- ANNEXURE A1 CERTIFIED COPY OF THE COMPLAINT FILED BY
THE 2ND RESPONDENT DATED 23.08.2014 UNDER
SECTION 105(1) OF THE FACTORIES ACT, 1948.
- ANNEXURE A2 CERTIFIED COPY OF THE ORDER BEARING NO.G2-
7014/2014/F&B DATED 14.08.2014 ISSUED BY
THE DIRECTOR OF FACTORIES & BOILERS,
KERALA.
- ANNEXURE A3 COPY OF THE FORM-18 REPORT DATED 24.5.2014

//TRUE COPY//

SD/- P.S. TO JUDGE