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P.C. AGGARWALA

v.

PAYMENT OF WAGES INSPECTOR, M.P. AND ORS.

SEPTEMBER 26, 2005

B

[ARIJIT PASAYAT AND H.K. SEMA, JJ.]

C

*Payment of Wages Act, 1936—Sections 3 and 15—Madhya Pradesh Industrial Relations Act, 1960—Section 3—Factories Act, 1948—Section 2(n)—Factory—Payment of Wages—Liability for—Concept of occupier provided in Section 2(n) of Act of 1948, as well as its amendment in year 1987, is not applicable to Act of 1936, as amended in year 1964 by Section 3 of State Act—Under Section 3 of the State Act only a person named as Manager of Factory and employer jointly, is made liable, and if a Director of Company owning the Factory was not so named, he could not be made*

D

*liable—Even otherwise also, Act of 1936 has statutorily not fixed any liability on the Directors of Company—Companies Act, 1956—Sections 5 and 291.*

E

*Interpretation of statutes—Reference versus incorporation of provision of one statute into another—Reference brings in subsequent amendment to provision—In case of incorporation, any subsequent amendment/repeal of provision does not affect the incorporated provision.*

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**Appellant is director of a Company owning certain factories that had ceased production. Inspector under Payment of Wages Act, 1936 filed an application under Section 15 thereof before concerned Magistrate for directions to Factory Manager and Directors of the Company for payment of wages for various periods. Factory manager replied to the notice contending *inter alia* that only he was responsible for payment of wages under the above Act, and no notice could be issued to Directors. However, authorities under the Act held the Directors personally liable to pay the wages, and this view was upheld by the High Court. Hence the present appeal.**

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**Appellant contended that the provisions of the Act of 1936 and amendment in Section 3 in the year 1964 by Madhya Pradesh Industrial Relations Act, 1960 were not considered by High Court. It was further contended that High Court erroneously proceeded on the basis that concept**

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of occupier, as introduced by amendment in year 1987 to Section 2(n) of Factories Act 1948 was incorporated in Section 3 of the Act of 1936. A

Allowing the appeal, the Court

HELD 1. There is no provision in Payment of Wages Act, 1936 like Section 2(n) of the Factories Act, 1948. Sections 3 and 15 of the former, as amended by Section 3 of Madhya Pradesh Industrial Relations Act, 1960, with effect from year 1964 only can apply to the fact situation of the present case. These do not even by implication bring in the concept of occupier. [529-B-C] B

*J.K. Industries and Ors. v. Chief Inspector of Factories and Boilers and Ors.*, [1996] 6 SCC 665, held inapplicable. C

2. The amendment to Section 2(n) of Factories Act, 1948 in the year 1987 does not apply to Madhya Pradesh Industrial Relations Act, 1960. If there is mere reference to a provision without incorporation, then unless a different intention appears it has to be considered as reference to the provision. If a provision is incorporated in another, any subsequent amendment or even its repeal would not affect the provision as incorporated in the latter Statute. [530-G; 531-A] D

*Mriyappa v. State of Karanataka*, [1988] 3 SCC 276, relied on.

*Minister of Housing and Local Govt. v. Hartnell*, [1965] 1 All ER 490 (HL), referred to. E

3.1. As the High Court has proceeded to hold the Directors liable by introducing the expression 'occupier' which expression is used in the Factories Act and not in the Payment of Wages Act, 1936, the basic premises on which the High Court proceeded are clearly untenable. Therefore, on a plain reading of the language of the governing statute, it cannot be held that the Directors had any personal liability. [535-C-D] F

*Employees and State Insurance Corporation, Chandigarh v. Gurdiar Singh and Ors.*, [1999] Supp. 1 SCC 204, followed.

*Employees State Insurance Corporation v. S.K. Aggarwal and Ors.*, [1998] 6 SCC 288 and *Indian Oil Corporn. Ltd. v. Chief Inspector of Factories*, AIR (1988) SC 2456, relied on G

3.2. Under Section 3 of the Payment of Wages Act, 1936, as amended by Section 3 of Madhya Pradesh Industrial Relations Act, 1960, the liability H

**A** is cast on a person who has been named as **Manager of the Factory** and the employer jointly. Therefore, in order to find out whether the **Director** had a responsibility for making the payment, two different things have to be established: (i) he was employer or (ii) he was person who has been named as **Manager of the factory**. In the instant case, there is no such allegation or evidence led. [532-D-E]

**B**

3.3. It is trite law that liability of a person is dependent upon the statutory prescriptions governing such liability. Sections 5 and 291 of the Companies Act, 1956 are to be noted in this regard. Section 5 refers to officer who is in default. Section 291 on the other hand relates to general powers of the Board of Directors. In order to attract the liability under the Payment of Wages Act, 1936, it has to be seen as to on whom the Act fixes responsibility for payment of wages. It speaks of the 'employer' which expression is defined in Section 2(i)(a). Section 15 refers to the claims arising out of deductions from wages or delaying payment of wages and penalty for malicious or vexatious claims. Statutorily no liability has been fixed on the Directors. [532-B-C]

**D**

*Tata Engineering Locomotive Company Ltd. v. State of Bihar, (1964) 6 SCR 885, relied on.*

*Palmer's Company Law, 20th Edn. p 136, referred to.*

**E** CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8300 of 2002.

From the Judgment and Order dated 30.8.97 of the Madhya Pradesh High Court in L.P.A. No. 55 of 1997.

WITH

**F** C.A. Nos. 8301-8303/2002 and 692 of 2005.

Dushyant Dave, Ramesh Singh, Ms. Nina Gupta, Ms. Shiva Lakshmi, Ms. Neelam Singh, Ms. Meha Kiran, Ms. Bina Gupta, Ms. Vibha Datta Makhija, N.R. Choudhary, Somnath Mukherjee, Ramesh Singh, K. Bhirava Swamy and

**G** Sanjay Kapur for the appearing parties.

The Judgment of the Court was delivered by

**H** **ARIJIT PASAYAT, J.** All these appeals involve identical issues. By judgments rendered by Division Bench of the Madhya Pradesh High Court, impugned in the appeals held that Directors of Jiyajirao Cotton Mills Ltd.

(hereinafter referred to as the 'Company') to be personally liable for the payment of wages to the workmen of the company under the Payment of Wages Act, 1936 (in short the 'Act'). However, the authorities under the Act could proceed against the assets of the company in the hands of the Directors or the assets acquired from income of the company by the Directors. The personal property of the Directors, however, could not be proceeded against if it acquired from the sources other than the income of the company. The Letters Patent Appeals filed against the judgments of the learned Single Judge were dismissed. It is to be noted that learned Single Judge had held that writ petitions were not maintainable as the writ petitioners had an alternative remedy under Section 17 of the Act. However, the Letters Patent Court considered the case on merits and as noted above came to the conclusion about liability of the Directors.

While the Directors who were writ petitioners had questioned correctness of the judgments rendered by the Division Bench, the functionaries under the Act have questioned correctness of that part of the High Court's judgment which restricted recovery from the assets acquired out of the company's income.

Background facts on which the dispute arises are as under:

In June 1991, the Company made an application to the State Government under Section 25-O of the Industrial Disputes Act, 1947 (in short the 'ID Act') as substituted by the Industrial Disputes (Madhya Pradesh Amendment) Act, 1983 (in short 'Madhya Pradesh Act') Act 32 of 1983 with effect from 28.10.1983 seeking permission for closure of cotton section of the Company. The State Government by order dated 18.8.1991 rejected the application on the ground that the same was pre-mature and the solution actually lay in re-deployment of the workforce and technical up-gradation. An application for review was made on 4.9.1991. Between April 1992 and April 1997 according to the Company all the factories ceased production on account of disconnection of electricity. One particular trade union filed an application before the Labour Court in Gwalior under Sections 36, 61 and 64A of the Madhya Pradesh Industrial Relations Act, 1960 (in short the 'MPIR Act'). The Labour Court held that the lay off was illegal and directed the Company to withdraw the same. On being moved under Section 67 read with Section 64A of the MPIR Act, the Industrial Court by order dated 2.5.1992 modified the same. The order was challenged by a writ petition before the High Court. An interim order was passed directing payment of 50% of total back wages plus dearness allowance. Disputes of

A this nature continued and on 28.8.1992 the Company made a reference to the Board of Industrial and Financial Re-construction (in short the 'BIFR') under Section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 (in short the 'SICA'). Subsequently, application was filed by Mazdoor Congress demanding payment of wages for certain periods. In January 1993 BIFR declared the Company to be a sick industrial company under Section 3(1)(o) of SICA. Notices were issued by the functionaries under the Act calling upon the Company through its Factory Manager to explain non payment of wages for certain periods in violation of Section 5 of the Act. For subsequent periods also, similar notices were issued. Copies of the notices were endorsed to the Directors of the Company. Subsequently, the Payment of Wages Inspector filed application under Section 15 of the Act before the concerned Magistrate against the Factory Manager, Shri K.B. Kaul and eight others who were Directors of the Company including the present appellants praying for directions to them for payment of wages for various periods. The Factory Manager submitted his reply. In particular, it was submitted by him that the application was vague since details of the workmen whose wages were allegedly not paid had not been given as required under the law. It was also stated that notice could not be issued to the Directors as only the Company and the Factory Manager were responsible for payment of wages under the Act. Pendency of the proceedings under the BIFR was also referred to. However, the authorities under the Act rejected the contention and held that the Directors were also personally liable to pay. Such directions were questioned before the High Court and as noted above, impugned judgments were passed.

In support of the appeals, filed by the erstwhile Directors, learned counsel submitted that the High Court has failed to maintain the distinction between the liability of the company and its Directors. The provisions of the Act and the amendments brought in by the Madhya Pradesh Act of 1964 have not been kept in view. The High Court erroneously proceeded on the basis as if the Directors were occupiers to hold that the decision of this Court in *J.K. Industries and Ors. v. Chief Inspector of Factories and Boilers and Ors.*, [1996] 6 SCC 665 applied to the facts of the case. In that case the provisions were entirely different and the ratio of that decision has no application to the facts of the present case. The stand of the authorities under the Act and the Labour Unions on the other hand is that looking at the beneficial nature of the statute, the High Court was justified in its conclusion. In any event, by application of the principles of legislation by incorporation or by reference the view taken by the High Court cannot be faulted.

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In order to appreciate the rival submissions the relevant provisions under the Act and the Amendment thereto by Madhya Pradesh Act of 1964 need to be noted. They are as under: A

*Section 2. DEFINITIONS.*

In this Act, unless there is anything repugnant in the subject or context, - B

(i) "employed person" includes the legal representative of a deceased employed person;

(ia) "employer" includes the legal representative of a deceased employer; C

(ib) "factory" means a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948) and includes any place to which the provisions of that Act have been applied under sub-section (1) of section 85 thereof; D

(ii) "industrial or other establishment" means any, -

(a) tramway service, or motor transport service engaged in carrying passengers or goods or both by road for hire or reward;

(aa) air transport service other than such service belonging to, or exclusively employed in the military, naval or air forces of the Union or the Civil Aviation Department of the Government of India; E

(b) Dock wharf or jetty;

(c) inland vessel, mechanically propelled; F

(d) mine, quarry or oil-field;

(e) plantation;

(f) workshop or other establishment in which articles are produced, adapted or manufactured, with a view to their use, transport or sale; G

(g) establishment, in which any work relating to the construction, development or maintenance of buildings, roads, bridges or canals, or relating to operations connected with navigation, irrigation or to the supply of water, or relating to the generation, transmission and distribution of electricity or any other form of power is being carried H

- A on;
- (h) any other establishment or class of establishments which the Central Government or a State Government may, having regard to the nature thereof, the need for protection of persons employed therein and other relevant circumstances, specify, by notification in the Official Gazette;
- B
- (iia) "mine" has the meaning assigned to it in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) "plantation" has the meaning assigned to it in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);
- C
- (iv) "prescribed" means prescribed by rules made under this Act;
- (v) "railway administration" has the meaning assigned to it in clause (6) of section 3 of the Indian Railways Act, 1890 (9 of 1890); and
- D
- (vi) "wages" means all remuneration (whether by way of salary, allowance or otherwise) expressed in terms of money or capable of being so expressed which would, if the terms of employment, express or implied, were fulfilled, be payable to a person employed in, respect of his employment or of work done in such employment, and includes-
- E
- (a) any remuneration payable under any award or settlement between the parties or order of a court;
- (b) any remuneration to which the person employed is entitled in respect of overtime work or holidays or any leave period;
- F
- (c) any additional remuneration payable under the terms of employment (whether called a bonus or by any other name);
- (d) any sum which by reason of the termination of employment of the person employed is payable under any law, contract or instrument which provides for the payment of such sum, whether with or without deductions, but does not provide for the time within which the payment is to be made;
- G
- (e) any sum to which the person employed is entitled under any scheme framed under any law for the time being in force;
- H but does not include -

- (1) any bonus (whether under a scheme of profit sharing or otherwise) which does not form part of the remuneration payable under the terms of employment or which is not payable under any award or settlement between the parties or order of a court; A
- (2) the value of any house-accommodation, or of the supply of light, water, medical attendance or other amenity or of any service excluded from the computation of wages by a general or special order of the State Government; B
- (3) any contribution paid by the employer to any pension or provident fund, and the interest which may have accrued thereon; C
- (4) any travelling allowance or the value of any travelling concession; C
- (5) any sum paid to the employed person to defray special expenses entailed on him by the nature of his employment; or
- (6) any gratuity payable on the termination of employment in cases other than those specified in sub-clause (d). D

**3. RESPONSIBILITY FOR PAYMENT OF WAGES.**

Every employer shall be responsible for the payment to persons employed by him of all wages required to be paid under this Act: E

Provided that, in the case of persons employed (otherwise than by a contractor) -

- (a) in factories, if a person has been named as the manager of the factory under [clause (f) of sub-section (1) of section 7 of the Factories Act, 1948 (63 of 1948)]; F
- (b) in industrial or other establishments, if there is a person responsible to the employer for the supervision and control of the industrial or other establishments;
- (c) upon railways (otherwise than in factories), if the employer is the railway administration and the railway administration has nominated a person in this behalf for the local area concerned. G

The person so named, the person so responsible to the employer, or the person so nominated, as the case may be; (shall also be responsible) for such payment. H

A 15. *CLAIMS ARISING OUT OF DEDUCTIONS FROM WAGES OR DELAY IN PAYMENT OF WAGES AND PENALTY FOR MALICIOUS OR VEXATIOUS CLAIMS.*

B (1) The State Government may, by notification in the Official Gazette, constitute under the Industrial Disputes Act, 1947 (14 of 1947) or under any corresponding law relating to the investigation and settlement of industrial disputes in force in the State or any Commissioner for Workmen's Compensation or other officer with experience as a judge of a Civil Court or as a stipendiary Magistrate to be the authority to hear and decide for any specified area all claims arising out of deductions from the wages, or delay in payment of the wages, of persons employed or paid in that area, including all matters incidental to such claims :

D Provided that where the State Government considers it necessary so to do, it may appoint more than one authority for any specified area and may, by general or special order, provide for the distribution or allocation of work to be performed by them under this Act.

E (2) Where contrary to the provisions of this Act any deduction has been made from the wages of an employed person, or any payment of wages has been delayed, such person himself, or any legal practitioner or any official of a registered trade union authorized in writing to act on his behalf, or any Inspector under this Act, or any other person acting with the permission of the authority appointed under sub-section (1), may apply to such authority for a direction under sub-section (3):

F Provided that every such application shall be presented within twelve months from the date on which the deduction from the wages was made or from the date on which the payment of the wages was due to be made, as the case may be:

G Provided further that any application may be admitted after the said period of twelve months when the applicant satisfies the authority that he had sufficient cause for not making the application within such period.

H (3) When any application under sub-section (2) is entertained, the authority shall hear the applicant and the employer or other person

responsible for the payment of wages under section 3, or give them an opportunity of being heard, and, after such further inquiry (if any) as may be necessary, may, without prejudice to any other penalty to which such employer or other person is liable under this Act, direct the refund to the employed person of the amount deducted, or the payment of the delayed wages, together with the payment of such compensation as the authority may think fit, not exceeding ten times the amount deducted in the former case and not exceeding twenty-five rupees in the latter, and even if the amount deducted or the delayed wages are paid before the disposal of the application, direct the payment of such compensation, as the authority may think fit, not exceeding twenty-five rupees :

Provided that no direction for the payment of compensation shall be made in the case of delayed wages if the authority is satisfied that the delay was due to -

- (a) a *bona fide* error or *bona fide* dispute as to the amount payable to the employed person, or
- (b) the occurrence of an emergency, or the existence of exceptional circumstances, such that the person responsible for the payment of the wages was unable, though exercising reasonable diligence, to make prompt payment, or
- (c) the failure of the employed person to apply for or accept payment.

(4) If the authority hearing an application under this section is satisfied

- (a) that the application was either malicious or vexatious, the authority may direct that a penalty not exceeding fifty rupees be paid to the employer or other person responsible for the payment of wages by the person presenting the application; or
- (b) that in any case in which compensation is directed to be paid under sub-section (3), the applicant ought not to have been compelled to seek redress under this section, the authority may direct that a penalty not exceeding fifty rupees be paid to the State Government by the employer or other person responsible for the payment of wages.

- A (4A) Where there is any dispute as to the person or persons being the legal representative or representatives of the employer or of the employed person, the decision of the authority on such dispute shall be final.
- B (4B) Any inquiry under this section shall be deemed to be a judicial proceeding within the meaning of sections 193, 219 and 228 of the Indian Penal Code (45 of 1860).
- (5) Any amount directed to be paid under this section may be recovered-
- C (a) if the authority is a Magistrate, by the authority as if it were a fine imposed by him as Magistrate, and  
(b) if the authority is not a Magistrate, by any Magistrate to whom the authority makes application in this behalf, as if it were a fine imposed by such Magistrate.
- D *Amendment to the Payment of Wages Act vide Madhya Pradesh Act of 1964 with effect from 15.05.1964.*
- (a) In Section 2 after Clause (i), the following clause has been inserted namely:
- E “(i-a) ‘Industrial Court’ means the Industrial Court constituted under Section 9 of the Madhya Pradesh Industrial Relations Act, 1960 (27 of 1960)”, and
- (b) After Clause (kk) the following clause has been inserted, namely:
- F “(ii-a) ‘Legal representative’ means the person who in law represents the estate of a deceased employed person.
- In Section 3, for the proviso, the following proviso has been substituted, namely:
- G “Provided that, in the case of persons employed (otherwise than by a contractor), -
- (d) in factories, if a person has been named as the manager of factory under Clause (f) of sub-section (1) of Section 7 of the Factories Act, 1948 (63 of 1948) then the person so named and the employer jointly and severally;
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(e) in industrial establishments, if there is a person responsible to the employer for the supervision and control of the industrial establishment, then the person so responsible and the employer, jointly and severally; A

(f) upon railways (otherwise than in factories) if the employer is the railway administration and the railway administration has nominated a person in this behalf for the local area concerned, then the person so nominated; shall be responsible for such payment." B

In Section 15-

(vi) in sub-section (1), for the words, "any Commissioner for workmen's compensation or other officer with experience as a Judge of a Civil Court or as a stipendiary Magistrate to be the authority" the words "one or more persons to be the authority" shall be substituted; C

(vii) after sub-section (1), the following sub-sections shall be inserted, namely: D

"(1-A) A person shall not be qualified for appointment as an authority under this Act, unless he is a Commissioner for workmen's compensation or any other officer with experience as a Judge of Civil Court or of a Labour Court constituted under the Madhya Pradesh Industrial Relations Act, 1960 (No. 27 of 1960). E

(1-B) Where more than one persons are appointed for any specified area as authorities under sub-section (1), the State Government may be general or special order, make arrangements as it thinks fit for the distribution of work among the authorities so appointed"; F

(viii) In sub-section (2),-

(a) after the words "to Act on his behalf, the words, figures and brackets "or a representative union recognized as such under the Madhya Pradesh Industrial Relations Act, 1960 (27 of 1960)", shall be inserted; G

(b) after the words, brackets and figure "sub-section (3)", the words "and in case of death of the employed person, it shall be lawful for his legal representative to make an application for such direction" shall be inserted; H

- A (ix) In sub-section (3),-
- (a) after the words “employed person”, the words “or his legal representatives, as the case may be”, shall be inserted;
- B (b) for the words “ten rupees in the latter”, the words “twenty-five rupees in the latter case and the authority may direct the payment of such compensation in case, where the amount deducted or the delayed wages are paid by the employer, to the employed person or his legal representative before the disposal of the application” shall be substituted;
- C (c) in the proviso, after the words “employed person” occurring twice, the words “or his legal representative” shall be inserted, and-
- (x) for sub-section (4), the following sub-sections shall be substituted, namely:
- D “(4) if the authority hearing any application under this section is satisfied,-
- (i) that the application was either malicious or vexatious, the authority may direct that any penalty not exceeding fifty rupees be paid to the employer or other person responsible for the payment of wages by the person presenting the application; or
- E (ii) that, in any case in which compensation is directed to be paid under sub-section (3), the applicant ought not to have been compelled to seek redress under this section, the authority may direct that a penalty not exceeding fifty rupees be also paid by
- F the employer or other person responsible for the payment of wages which shall, when paid or recovered, be credited to the State Government.
- (4-A) Where a question arises as to whether any person is or is not
- G a legal representative of the deceased employed person, such question shall be determined by the authority appointed under sub-section (1) and his decision shall be final.
- (4-B) The payment of the amount directed to be paid under this
- H section to the employed person or his legal representative, as the case may be, shall be full and complete discharge of the employer from the liability to make such payment under this Act, and no further claim

shall lie against the employer in respect thereof’.

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In *J.K. Industries’* case (supra), the controversy related to the effect of 1987 amendment. In paras 26, 44 and 62 it was observed as follows:

“26- Thus, we find that after the 1987 amendment, the true import of the 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 purposes of the Factories Act. Such an occupier cannot be any other employee of the Company of 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 7-A of the Act.

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44- 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. Natrass*, (1972) AC 153 are useful:

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“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 test is in conformity with the classic statement of Viscount Haldane, Lord Chancellor, in *Lennard’s Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*, (1915 AC 705)

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A The passage of Viscount Haldane, Lord Chancellor, in *Lennard's Carrying Co. Ltd.*, case (supra) referred to by Lord Diplock, is as follows:

B “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 that person has an authority coordinate with the board of directors given to him under the articles of association.....”

62.- To sum up our conclusions are:

D (1) in the case of a 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 Act and the Company cannot nominate any other employee to be the occupier of the factory;

E (2) Where the Company fails to nominate one of its directors as the occupier of the factory, the Inspector of the factories shall be at liberty to proceed against any one of the directors of the company treating him as 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.

F (3) Proviso (ii) to Section 2(n) of the Act is *intra vires* 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;

G (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.”

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The judgment was rendered in the background of Section 2(n) proviso (ii) of the Factories Act, 1948 as amended in 1987. The question involved in the said case was who can be nominated as occupier by a Company owning the factory. Considering the said provision, it was held that only one of its Directors and none of its employees or officers can be nominated as occupier of the factory by such company. There is no such provision in the Act like Section 2(n) of the Factories Act. The quoted portion of the Act as amended only can apply to the fact situation of the present case. Though, it was contended by learned counsel for the State and the Labour Unions that Section 3 as amended by the M.P. Amendment Act brought in the concept of occupier, the contention has only to be noted to be rejected. Section 3 of the Act and the amended Section 3 by M.P. Amendment Act do not even by implication bring in the concept of occupier which formed the foundation in *J.K. Industries* case (supra).

The principles of legislation by incorporation or by reference have been dealt with by this Court in many cases.

A distinction has been made between a mere reference or citation of one of the statutes into another and incorporation. A Statute may instead of referring to a particular previous statute or to any specific provision therein refer to the law on the subject generally. In such cases a reference is construed to mean that the law is as it reads thereafter including amendments subsequently to the time of adoption, as was noted by Sutherland; *Statutory Construction*, Vol. 2, 3rd Edn., p. 550 and supplement (1956), p. 119.

The legislation by referable incorporation falls into two categories. That is (i) where a statute by specific reference incorporates the provisions of another statute as at the time of adoption, and (ii) where a statute incorporates by general reference. The Law concerning a particular subject has a genus. In the former case the subsequent amendments made in the referred statute cannot automatically be read into the adopting statute. But in the second category it may be presumed that the legislative intent was to include all the subsequent amendments also made from time to time in the generic law on the subject adopted by the general reference.

In the former case a modification, repeal or re-enactment of the statute that is referred will also have effect in the statute in which it is referred; but in the latter case any change in the incorporation statute by way of amendment or repeal has no repercussion on the incorporating statute. The rule that the

A repeal or amendment of an Act which is incorporated in a later Act has no effect on the later Act or on the provisions incorporated therein is subject to four exceptions. They are: (i) where the later Act and the earlier Act are supplemental to each other, (ii) where the two Acts are in *pari materia*, (iii) where the amendment of the earlier Act if not imported in the later Act would render it wholly unworkable, and (iv) where the amendment of the earlier Act either expressly or by necessary intendment also applies to the later Act. Even though only particular sections of the earlier Act are incorporated into the later statute, in construing the incorporated provisions it may be necessary and permissible to refer to other parts of the earlier statute which are not incorporated. This does not however mean that a provision in the nature of a proviso or exception in the earlier Act which is not brought in by incorporation can be read in a manner so as to limit the meaning of the provision incorporated. Reference to other provisions of the earlier statute is only permissible to cull out meaning of the provision incorporated.

In the illuminating words of Lord Esher, M.R.:

“If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act as if they had been actually written in it with the pen, or printed on it.” (See *Wood’s Estate. Re, ex p Works and Buildings Commrs.*, (1886) 31 Ch D 607)

It may be added that clear intention of the incorporating Act cannot be defeated by such provision of the earlier Act which have not been incorporated. In the interpretation of an incorporated provision, the Court is sometimes required to formulate variations of details in the context of the incorporating statute. (See *Mariyappa v. State of Karnataka*, [1998] 3 SCC 276). The merit of legislation by incorporation is brevity which is sometimes counterbalanced by difficulties and obscurities which it is likely to create.

In *Minister of Housing and Local Govt. v. Hartnell*, [1965] 1 All ER 490 (HL). It was observed that there is a regrettable modern tendency to overdo legislation by reference and to attempt brevity at the expense of lucidity.

The amendment to the Factories Act, 1948 (in short ‘Factories Act’) does not apply to the M.P. Act. If there is mere reference to a provision without incorporation, then unless a different intention appears it has to be considered as reference to the provision. If a provision is incorporated in another, any subsequent amendment or even its repeal would not affect the

provision as incorporation in the latter Statute.

In *Employees' State Insurance Corporation, Chandigarh v. Gurdial Singh and Ors.*, [1991] Supp 1 SCC 204 a three-Judge Bench of this Court was considering the liability flowing from Section 2(17) of the Employees State Insurance Act, 1948 (in short the 'ESI Act'). This Court held as follows:

"This appeal by special leave is directed against the judgment of the High Court of Punjab & Haryana affirming the decision of the single Judge in a writ petition. The short question that came before the High Court for consideration was whether the Directors of a private limited company had personal liability to meet the demand of contribution arising under the Employees' State Insurance Act, 1948. Their liability depended upon the correct interpretation of the term 'principal employer' appearing in S. 2(17) of the Act. The definition reads thus:

"2(17) 'Principal employer' means;

(i) in a factory, the owner or occupier and includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named as the manager of the factory under the Factories Act, 1948 (63 of 1948), the person so named;

(ii) in any establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf or where no authority is so appointed, the head of the Department;

(iii) in any other establishment, any person responsible for the supervision and control of the establishment."

2. There is no dispute that clause (ii) does not apply. What is relevant to consider is whether the liability of Directors is covered under clause (i) and if it is, clause (iii) being residuary would not apply and in case it is not covered by clause (i), the matter would be regulated by clause (iii). Admittedly the company had a factory and it is not in dispute that the occupier of the factory had been duly named. It is also not in dispute that it had a manager too. In view of the clear terms in the definition, we are of the view that Directors did not come within clause (i), but the occupier being there, clause (i) applied and in that

A view of the matter, clause (iii) could have no application.

Though the position is slightly different in the Factories Act in view of the amendment as noted in *J.K. Industries* case (supra), the view regarding the personal liability of the Directors is clearly applicable.

B It is trite law that liability of a person is dependent upon the statutory prescriptions governing such liability. Sections 5 and 291 of the Companies Act, 1956 (in short 'Companies Act') are to be noted in this regard. Section 5 refers to officer who is in default. Section 291 on the other hand relates to general powers of the Board of Directors. In order to attract the liability under the Act, it has to be seen as to on whom the Act fixes the liability. Section C 3 speaks of the responsibility for payment of wages. It speaks of the "employer" which expression is defined in Section 2(ia). Section 15 refers to the claims arising out of deductions from wages or delaying payment of wages and penalty for malicious or vexatious claims. Statutorily no liability has been fixed on the Directors.

D Under Section 3 of the Act as amended by the M.P. Amendment, the liability is cast on a person who has been named as Manager of the Factory and the employer jointly. Therefore, in order to find out whether the Director had a responsibility for making payment, two different things have to be established: (i) he was the employer or (ii) he was a person who has been E named as Manager of the factory. In the instant case, there is no such allegation or evidence led.

Considering a case under the 'ESI Act' and certain provisions of the Indian Penal Code, 1860 (in short the 'IPC'), this Court in *Employees State Insurance Corporation v. S.K. Aggrawal and Ors.*, [1998] 6 SCC 288 observed as follows: F

G "4. Sec. 2(17) of the Employees' State Insurance Act, however, defines the principal employer as either owner or occupier - taking care of all eventualities. When the owner of the factory is the principal employer, there is no need to examine who is occupier. The owner will be the principal employer under S. 40.

5. The Employees' State Insurance Act does not define the term "employer" although under Sections 85B and 85C of that Act the term "employer" is used.

H

10. Therefore, even if we read the definition of “principal employer” under the Employees’ State Insurance Act, 1948 in Explanation 2 to S. 405 of the Indian Penal Code, the directors of the company, in the present case, would not be covered by the definition of “principal employer” when the company itself owns the factory and is also the employer of its employees at the head office.”

In *Tata Engineering and Locomotive Company Ltd. v. State of Bihar and Ors.*, [1964] 6 SCR 885 the basic features of a Company, its corporate existence and its position *vis-a-vis* shareholders was highlighted as follows:

“The true legal position in regard to the character of a corporation or a company which owes its incorporation to a statutory authority is not in doubt or dispute. The corporation in law is equal to a natural person and has a legal entity of its own. The entity of the corporation is entirely separate from that of its shareholders; it bears its own name and has a seal of its own; its assets are separate and distinct from those of its members; it can sue and be sued exclusively for its own purpose; its creditors cannot obtain satisfaction from the assets of its members; the liability of the members or shareholders is limited to the capital invested by them; similarly, the creditors of the members have no right to the assets of the corporation. This position has been well-established ever since the decision in the case of *Salomon v. Salomon & Co.*, (1897) A.C. 22, H.L. was pronounced in 1897; and indeed, it has always been the well-recognised principle of common law. However, in the course of time, the doctrine that the corporation or a company has a legal and separate entity of its own has been subjected to certain exceptions by the application of the fiction that the veil of the corporation can be lifted and its face examined in substance. The doctrine of the lifting of the veil thus marks a change in the attitude that law had originally adopted towards the concept of the separate entity or personality of the corporation. As a result of the impact of the complexity of economic factors, judicial decisions have sometimes recognised exceptions to the rule about the juristic personality of the corporation. It may be that in course of time these exceptions may grow in number and to meet the requirements of different economic problems, the theory about the personality of the corporation may be confined more and more.”

The doctrine of lifting of the veil has been applied, in the words of

- A** Palmer, in five categories of cases: where companies are in relationship of holding and subsidiary (or sub-subsidiary) companies; where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors of the company on the ground that, with his knowledge, the company continued to carry on business six months after the number of its members was reduced below the legal minimum; in certain matters pertaining
- B** to the law of taxes, death duty and stamps, particularly where the question of the "controlling interest" is in issue; in the law relating to exchange control, and in the law relating to trading with the enemy where the test of control is adopted (Palmer's Company Law, 20th Edn., page 136, now page 215, 24th Edn. 1987). In some of these cases judicial decisions have no doubt lifted the
- C** veil and consider the substance of the matter.

- Gower has similarly summarized this position with observation that in a number of important respects, the legislature has rent the veil woven by the *Salomon* case. Particularly is this so, says Gower, in the sphere of taxation and in the steps which have been taken towards the recognition of the
- D** enterprise - entity rather than corporate entity. It is significant, however, that according to Gower the Courts only have construed statutes as "cracking open the corporate shell" when compelled to do so by the clear words of the statute - indeed they have gone out of their way to avoid this construction whenever possible. Thus, at present the judicial approach in cracking open
- E** the corporate shell is somewhat cautious and circumspect. It is only when the legislative provision justifies the adoption of such a course that the veil has been lifted. In exceptional cases where courts have felt "themselves able to ignore the corporate entity and to treat the individual shareholder as liable for its acts" the same course has been adopted. Summarizing his conclusions,
- F** Gower has classified seven categories of cases where the veil of corporate body has been lifted. But it would not be possible to evolve a rational consistent and inflexible principle which can be invoked in determining the question as to whether the veil of the corporation should be lifted or not. Broadly, where fraud is intended to be prevented, or trading with enemy is sought to be defeated, the veil of corporation is lifted by judicial decision and
- G** the shareholders are held to be "persons who actually work for corporation".

- According to *J.K. Industries*, case (supra) only a Director can be nominated as occupier and not simply an officer or employee. This Court observed this to be the result of the 1987 amendment of the Factories Act. The discretion of inspector of factories as to occupier can be exercised only
- H** where no director is identified or nominated as an occupier. The decision of

this Court to the effect that only a director of the Company can be appointed as an occupier of the factory, has been, on the facts of the particular case distinguished by this Court in *Indian Oil Corpn. Ltd. v. Chief Inspector of Factories*, AIR (1998) SC 2456. This Court held that 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 and controlled by the Central Government, the general principle applicable to non-Government companies was held to be not applicable. A  
B

As the High Court has proceeded to hold the Directors liable by introducing the expression "occupier", which expression is used in the Factories Act and not in the Act, the basic premises on which the High Court proceeded are clearly untenable. Therefore, on a plain reading of the language of the governing statute, it cannot be held that the Directors had any personal liability. The judgments of the High Court are therefore not sustainable and are set aside. In view of the aforesaid conclusion, the appeals filed by the functionaries under the Act lack merits. However, it shall be in the interest of employees if the properties of the Company which are stated to be under the control of Official Liquidator are disposed of early so that the employees can be paid whatever is legally payable to them. Similarly the other creditors can be paid and the liability can be discharged. C  
D  
E

The appeals filed by the Directors are allowed and the appeals filed by the functionaries under the Act and the State are dismissed. There shall be no order as to costs.

VS.

Appeal allowed.