IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 06TH DAY OF DECEMBER, 2021

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPRASANNA

WRIT PETITION No.11451 OF 2018 (GM- RES)

BETWEEN:

MR. YASHIHIRAO HORINOUCHI
S/O MR. KEIICH HORINOUCHI,
AGED ABOUT 56 YEARS
OCCUPIER,
M/S TOYOTA KIRLOSKAR MOTOR PRIVATE LIMITED.,
PLOT NO.1, BIDADI INDUSTRIAL AREA,
RAMANAGAR DISTRICT - 562 109

... PETITIONER

(BY SRI S.N.MURTHY, SR.ADVOCATE A/W
SRI SOMASHEKAR, ADVOCATE (VIDEO
CONFERENCING))

AND:

THE DEPUTY DIRECTOR OF FACTORIES
DEPARTMENT OF FACTORIES AND BOILERS,
DIVISION-4, 2ND FLOOR, KARMIKA BHAVAN,
BANNERGHATTA ROAD,
BENGALURU-560029

... RESPONDENT

(BY SMT.NAMITHA MAHESH B.G., AGA (PHYSICAL
HEARING))

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA READ WITH SECTION 482 OF CR.P.C., PRAYING TO QUASH FURTHER PROCEEDINGS IN

CC.NO.757/2017 ON THE FILE OF THE PRINCIPAL CIVIL JUDGE AND JMFC, RAMANAGARA AT ANNEXURE-F TO THIS WRIT PETITION.

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 09.11.2021 COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING :-

ORDER

The petitioner who is the occupier of M/s Toyota Kirloskar Motor Private Limited has filed the subject writ petition calling in question the proceedings in C.C.No.757 of 2017 pending on the file of the Principal Civil Judge and JMFC, Ramanagara initiated under the provisions of the Factories Act, 1948.

2. Brief facts leading to the filing of the present petition, as borne out from the pleadings, are as follows:-

The petitioner is the occupier of M/s Toyota Kirloskar Motor Private Limited Company ('Company' for short), a company engaged in the manufacture of motor cars. On 11-04-2017 one Mr. Theertha Prasad, Forklift operator while removing the module using forklift, a workman by name Mr. Santhosh Patgar, who was a tow truck operator entered into forklift movement area and when reversing of the forklift was in

progress meets with an accident which resulted in an injury of his left leg. It is contended that the Company immediately took Sri Santhosh Patgar to the Company's occupational health centre for first aid treatment and thereafter, immediately shifted to BGS Hospital, Uttarahalli for further treatment.

3. In terms of the Factories Act, 1948 (hereinafter referred to as 'the Factories Act' for short) the petitioner immediately furnished the said information to the respondent in Form No.17 with regard to the accident that has occurred and treatment that he was given on 11-04-2017. The information was submitted as required in Form No.17 under the Factories Act. On receipt of the said information, the respondent inspected the premises on 12-04-2017 and submitted an inspection report. The respondent again visited the premises on 22-06-2017. A show cause notice was issued on the petitioner on 23-06-2017. The petitioner replied to the said show cause notice on 11-08-2017.

4. It is the claim of the petitioner that he was taken by surprise that the respondent without passing any order on the

reply given to the show cause notice dated 23-06-2017, a complaint under Section 200 of the Cr.P.C. was registered against the petitioner for contravention of Section 7A(2)(c) of the Factories Act. The respondent in the complaint has narrated that the injured workman entered into forklift area to pick up gloves. The complaint was registered as C.C.No.757 of 2017. It is challenging the said proceedings, the petitioner is before this Court in the subject writ petition.

5. Heard the learned Senior Counsel Sri.S.N.Murthy appearing for the petitioner and the learned Additional Government Advocate Smt. B.G.Namitha Mahesh.

6. Learned Senior Counsel Sri S.N.Murthy would vehemently argue and contend that the complaint is registered against the occupier of the factory and not the Company and the complaint itself would not be maintainable in the form that it is presented i.e., in the absence of the Company being arrayed as an accused. The other submission that the learned Senior Counsel would make is that having issued a show cause notice

and the reply having been submitted by the petitioner, an order ought to have been passed by the respondent against which an appeal is provided under the Factories Act in terms of Section 107 of the Factories Act. By registration of criminal complaint even without passing an order the petitioner has lost the right of appeal as provided under the statute. In furtherance of his submissions, he would place reliance upon the following judgments of the Apex Court and that of this Court:

(i) ***ANEETA HADA & OTHERS v. GODFATHER TRAVELS AND TOURS PRIVATE LIMITED***
– AIR 2012 SC 2795;

(ii) ***SUNIL BHARTI MITTAL v. CENTRAL BUREAU OF INVESTIGATION***
– (2015) 4 SCC 609;

(iii) ***B.K. PANDURANGA v. THE STATE***
– Criminal Petition No.8579/2015 decided on 1st February, 2016;

(iv) ***VIGNESHWAR GOPAL KRISHNA BHAT AND ANOTHER v. STATE OF KARNATAKA***
– Criminal Petition No.2872 of 2018 decided on 28-06-2018;

(v) ***JOSEPH ZACHARIAH AND OTHERS v. H.N. DEVARAJU AND ANOTHER***
– Criminal Petition No.7666 of 2018 decided on 18th January, 2019; and

(vi) ***MANI K.THOMAS v. SENIOR LABOUR INSPECTOR*** *– Criminal Petition No.7344 of 2017 c/w Criminal Petition No.7343 of 2017 decided on 18th November, 2019.*

7. On the other hand, learned Additional Government Advocate Smt.Namitha Mahesh B.G., refuting the submissions would vehemently argue and contend that there is no statutory obligation for the respondent to pass an order under the Factories Act. The show cause notice is issued only to bring it to the notice of the occupier that proceedings under the Factories Act would be initiated. The offence alleged against the petitioner is in violation of Section 7A(2)(c) of the Factories Act. The said provision does not require passing of an order prior to registration of a criminal case against the occupier.

7.1. The learned Additional Government Advocate would further contend that all the judgments relied on by the learned Senior Counsel were interpreting the provisions of different enactments and not the Factories Act. The Factories Act does not mandate that the Company should be made a party in the

proceedings instituted under the Factories Act and would place reliance in extenso on the judgment of the Apex Court in the case of ***J.K. INDUSTRIES LIMITED AND OTHERS v. CHIEF INSPECTOR OF FACTORIES AND BOILERS AND OTHERS*** – *(1996) 6 SCC 665.*

8. I have given my anxious consideration to the submissions made by the learned Senior Counsel and the learned Additional Government Advocate and have perused the material on record. In furtherance whereof, the points that would arise for my consideration are twofold :–

(i) *Whether non-arraigning of the Company as an accused would vitiate the proceedings?*

(ii) *Whether an order is required to be passed under Section 7A(2)(c) of the Factories Act, on the reply submitted to the show cause notice to enable the occupier to file an appeal under Section 107 of the Factories Act before registration of the criminal case?*

I will now proceed to examine these points in their seriatim.

Point No.1: *Whether non-arraigning of the Company as an accused would vitiate the proceedings?*

9. The afore-narrated facts not being in dispute are not reiterated. The Company is not arrayed as an accused in the impugned proceedings. The law in regard to the Company not being made a party and the complaint getting vitiated on that score is considered by the Apex Court in the case of ***ANEETA HADA***[1] *(supra)* has held as follows:

> ***48. In Anil Hada [(2000) 1 SCC 1: 2001 SCC (Cri) 174] the two-Judge Bench posed the question: when a company, which committed the offence under Section 138 of the Act eludes from being prosecuted thereof, can the Directors of that company be prosecuted for that offence. The Bench referred to Section 141 of the Act and expressed the view as follows: (SCC pp. 7-8, paras 12-13)***
>
> > ***"12. Thus when the drawer of the cheque who falls within the ambit of Section 138 of the Act is a human being or a body corporate or even firm, prosecution proceedings can be initiated against such drawer. In this context the phrase 'as well as' used in sub-section (1) of Section 141 of the Act has some importance. The said phrase would embroil the persons mentioned in the first category within the tentacles of the offence on a par with the offending company. Similarly the words 'shall***

[1] ***AIR 2012 SC 2795***

also' in sub-section (2) are capable of bringing the third category persons additionally within the dragnet of the offence on an equal par. The effect of reading Section 141 is that when the company is the drawer of the cheque such company is the principal offender under Section 138 of the Act and the remaining persons are made offenders by virtue of the legal fiction created by the legislature as per the section. Hence the actual offence should have been committed by the company, and then alone the other two categories of persons can also become liable for the offence.

13. If the offence was committed by a company it can be punished only if the company is prosecuted. But instead of prosecuting the company if a payee opts to prosecute only the persons falling within the second or third category the payee can succeed in the case only if he succeeds in showing that the offence was actually committed by the company. In such a prosecution the accused can show that the company has not committed the offence, though such company is not made an accused, and hence the prosecuted accused is not liable to be punished. The provisions do not contain a condition that prosecution of the company is sine qua non for prosecution of the other persons who fall within the second and the third categories mentioned above. No doubt a finding that the offence was committed by the company is sine qua non for convicting those other persons. But if a company is not prosecuted due to any legal snag or otherwise, the other prosecuted persons cannot, on that score alone, escape from the penal liability created through the legal fiction envisaged in Section 141 of the Act."

53. It is to be borne in mind that Section 141 of the Act is concerned with the offences by the company. It makes the other persons vicariously

> ***liable for commission of an offence on the part of the company. As has been stated by us earlier, the vicarious liability gets attracted when the condition precedent laid down in Section 141 of the Act stands satisfied. There can be no dispute that as the liability is penal in nature, a strict construction of the provision would be necessitous and, in a way, the warrant."***
>
> *(Emphasis supplied)*

In a later judgment, the Apex Court in the case of ***SUNIL BHARTI MITTAL***[2] *(supra)* has held as follows:

> *60. It may be appropriate at this stage to notice the observations made by MacNaghten, J. in Director of Public Prosecutions v. Kent and Sussex Contractors Ltd. [1944 KB 146 : (1944) 1 All ER 119 (DC)] : (KB p. 156)*
>
> *A body corporate is a "person" to whom, amongst the various attributes it may have, there should be imputed the attribute of a mind capable of knowing and forming an intention—indeed it is much too late in the day to suggest the contrary. It can only know or form an intention through its human agents, but circumstances may be such that the knowledge of the agent must be imputed to the body corporate. Counsel for the respondents says that, although a body corporate may be capable of having an intention, it is not capable of having a criminal intention. In this particular case the intention was the intention to deceive. If, as in this case, the responsible agent of a body corporate puts forward a document knowing it to be false and intending that it should deceive, I apprehend, according to the authorities that Viscount Caldecote, L.C.J., has cited, his knowledge and intention must be imputed to the body corporate.*

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[2] ***(2015) 4 SCC 609***

61. The principle has been reiterated by Lord Denning in Bolton (H.L.)(Engg.) Co. Ltd. v. T.J. Graham & Sons Ltd. [(1957) 1 QB 159 : (1956) 3 WLR 804 : (1956) 3 All ER 624 (CA)] in the following words : (QB p. 172)

A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are Directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. That is made clear in Lord Haldane's speech in Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd. [1915 AC 705 : (1914-15) All ER Rep 280 (HL)] (AC at pp. 713 & 714). So also in the criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the Directors or the managers will render the company themselves guilty.

62. The aforesaid principle has been firmly established in England since the decision of the House of Lords in Tesco Supermarkets Ltd. v. Nattrass [1972 AC 153 : (1971) 2 WLR 1166 : (1971) 2 All ER 127 (HL)] . In stating the principle of corporate liability for criminal offences, Lord Reid made the following statement of law : (AC p. 170 E-G)

'I must start by considering the nature of the personality which by a fiction the law attributes to a

corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these : it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. ***In that case any liability of the company can only be a statutory or vicarious liability.'***

63. From the above it becomes evident that a corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring mens rea. The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons. The position of law on this issue in Canada is almost the same. Mens rea is attributed to

corporations on the principle of 'alter ego' of the company.

64. So far as India is concerned, the legal position has been clearly stated by the Constitution Bench judgment of this Court in Standard Chartered Bank v. Directorate of Enforcement [(2005) 4 SCC 530 : 2005 SCC (Cri) 961] . On a detailed consideration of the entire body of case laws in this country as well as other jurisdictions, it has been observed as follows : (SCC p. 541, para 6)

'6. There is no dispute that a company is liable to be prosecuted and punished for criminal offences. Although there are earlier authorities to the effect that corporations cannot commit a crime, the generally accepted modern rule is that except for such crimes as a corporation is held incapable of committing by reason of the fact that they involve personal malicious intent, a corporation may be subject to indictment or other criminal process, although the criminal act is committed through its agents.'"

40. It is abundantly clear from the above that the principle which is laid down is to the effect that the criminal intent of the "alter ego" of the company, that is the personal group of persons that guide the business of the company, would be imputed to the company/corporation. The legal proposition that is laid down in the aforesaid judgment in Iridium India case [Iridium India Telecom Ltd. v. Motorola Inc., (2011) 1 SCC 74: (2010) 3 SCC (Cri) 1201] is that if the person or group of persons who control the affairs of the company commit an offence with a criminal intent, their criminality can be imputed to the company as well as they are "alter ego" of the company."

(Emphasis supplied)

This Court following the aforesaid judgments in the case of ***B.K.PANDURANGA***[3] *(supra)* has quashed the proceedings on the ground that the Company was not arrayed as an accused.

Again in the case of ***VIGNESHWAR GOPAL KRISHNA BHAT***[4] following the judgment of the Apex Court in the case of ***ANEETA HADA*** has quashed the proceedings. This is again reiterated in the case of ***JOSEPH ZACHARIAH*** where the proceedings are quashed on the very same ground.

The latest in the line of the aforesaid judgments on the said principle is the one that is passed by this Court in ***MANI K.THOMAS*** *(supra)*. Therefore, what would emerge in the first blush on placing reliance upon the aforesaid judgments is that without making the Company a party, the private complaint registered by the respondent against the petitioner would not be maintainable, but the issue requires a deeper delving.

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[3] ***Crl.P.No.8579/2015 decided on 1-02- 2016***
[4] ***Crl.P.No.2872/2018 decided on 28-06-2018***

10. The law as laid down by the Apex Court in the case of ***ANEETA HADA*** has been followed by this Court in plethora of judgments. The point that falls for consideration is whether those judgments would straight away cover the present case at hand, which requires interpretation of the Factories Act. The judgment in the case of ***ANEETA HADA*** was interpreting Section 141 of the Negotiable Instruments Act. Section 141 of the Negotiable Instruments Act, 1881 reads as follows:

> ***"141. Offences by companies.—(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:***
>
> *Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:*
>
> *Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.*

> ***(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.***
>
> *Explanation.—For the purposes of this section, —*
>
> ***(a) "company" means anybody corporate and includes a firm or other association of individuals; and***
> ***(b) "director", in relation to a firm, means a partner in the firm."***
>
> *(Emphasis supplied)*

The language employed in Section 141 of the Negotiable Instruments Act is plain and clear. The finding has to be recorded that the Company has committed the offence and such finding cannot be recorded unless the Company is before the Court. It is in that purport ***ANEETA HADA*** was rendered. The judgment in the case of ***SUNIL BHARTI MITTAL*** *(supra)* was against a Company itself with regard to 2G Spectrum case. Therefore, the same finding in the case of ***ANEETA HADA*** is followed in the said case *inter alia*.

11. This Court in the case of ***B.K. PANDURANGA*** was interpreting the provisions of '**Equal Remuneration Act, 1976**' and '**The Payment of Gratuity Act, 1972**'. The judgment rendered by this Court reads as follows:

> *"The petitioner herein is arrayed as accused in a prosecution initiated against him under the provisions of Equal Remuneration Act, 1976, (for brevity, Act).*
>
> *He is brought to book in the capacity of employer as contemplated under Sections 2 and 5 of the Act. That takes us to the definition clause of 'employer' as contemplated under Section 2(c) of the Act which reads thus:*
>
> > ***2(c)*** *"employer" has the meaning assigned to it in clause (f) of Section 2 of the Payment of Gratuity Act, 1972(39 of 1972)*
>
> *That leads to Section 2(f) of the Payment of Gratuity Act, 1972. Relevant provision under the Gratuity Act is Section 2(f)(iii) which reads thus:*
>
> > ***2(f)(iii)*** *in any other case, the person, who, or the authority which, has the ultimate control over the affairs of the establishment, factory, mine, oilfield, plantation, port, railway company or shop, and where the said affairs are entrusted to any other person, whether called a manager, managing director or by any other name, such person;*
>
> *It is authority who has ultimate control over the affairs of the company that can be held responsible and*

vicarious responsibility cannot be fastened. But the petitioner being a Company Executive, in the absence of specific averment against him, he cannot be a person having ultimate control over the administration and business of the company. That apart, though the allegation is against the company, it is not arrayed as co-accused.

In the judgment of the Apex Court, in Sunil Bharthi Mittal Vs. Central Bureau of Investigation ((2015) 4 SCC 609), placing reliance on the judgment of the Constitutional Bench, in the case of Standard Chartered Bank Vs. Directorate of Enforcement, ((2005), 4 SCC 530)), it was held at paras 42 and 44 read thus:

> *42. No doubt, a corporate entity is an artificial person which acts through its officers, Directors, Managing Director, Chairman, etc. If such a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. It would be more so, when the criminal act is that of conspiracy. However, at the same time, it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless the statue specifically provides so.*
>
> *44. When the company is the offender, vicarious liability of the Directors cannot be imputed automatically, in the absence of any statutory provision to this effect. One such example is Section 141 of the Negotiable Instruments Act, 1881. In Aneet Hada, the Court noted that if a group of persons that guide the business of the company have the criminal intent, that would be imputed to the body corporate and it is in this backdrop, Section 141 of*

> *the Negotiable Instruments Act has to be understood. Such a position is, therefore, because of statutory intendment making it a deeming fiction. Here also, the principle of "alter ego", was applied only in one direction, namely, where a group of persons that guide the business had criminal intent, that is to be imputed to the body corporate and not vice versa. Otherwise, there has to be a specific act attributed to the Director or any other person allegedly in control and management of the company, to the effect that such a person was responsible for the acts committed by or on behalf of the company.*
>
> *In that view of the matter, the prosecution against this petitioner is mis-conceived and liable to be quashed.*
>
> *Petition is allowed. The entire proceedings in CC No.2151/2014, on the file of the 4th Addl. Metropolitan Magistrate, Bengaluru, so far as this petitioner is concerend, is quashed."*

In the case of ***VIGNESHWAR GOPAL KRISHNA BHAT*** *(supra),* the provisions of the '**Payment of Wages Act, 1936**', fell for interpretation, wherein this Court holds as follows:

> *"The petitioners have called in question the order dated 12.03.2018 passed by the Metropolitan Magistrate, Traffic Court-1, Mayo hall, MG Road, Bengaluru, in taking cognizance for the offence under Section 21(3) of Payment of Wages Act, 1936 against the petitioners herein and registering a case in C.C. No.10137/2018.*

2. On perusal of the complaint dated 08.03.2018, lodged by the respondent-Senior Labour Inspector, 5th Circle, Karmika Bhavana, Bengaluru, against the petitioners, it discloses that the Director and the Executive/Vice President respectively have been arraigned as Accused Nos. 1 & 2 without making the Company as a party. The petitioners are cited as Director and Vice President respectively of M/s. Shoba Ltd. (for short, Company), in the cause title.

3. This court in many cases has in detail dealt with the legal aspect with regard to whether the President or Directors of a company can be made as parties individually without there being a company made as a party relying on a decision of the Hon'ble Apex Court reported in Anitha Hada Vs. Godfather Travels and Tours Pvt. Ltd.. (2012) 5 SCC 661), wherein the Hon'ble Apex Court has summarized the liability of the company and the Directors, and has categorically laid down the principal that, the corporate criminal liability with reference to the company and the nature of its entity and applicability of criminal liability has to be considered only if the company is made as a party. In this case, as the company is a juristic person having separate name M/s. Shobha Ltd. and a project called ie., M/s. Shobha Dream Acres (Shobha Rain Forest) and entity, a criminal liability can be fastened on it. If a company is not facing any criminal liability and only for prosecution purpose making the incharge of the company as parties without arraigning the company as a party, then complaint is not maintainable. The same principle is also applicable sofaras this case is concerned, where the Company-M/s. Shoba Ltd. has not been made as a party, but the petitioners who are president and Director respectively have been made as parties. Therefore, the complaint itself is not maintainable without there being a company made as a party.

> *4. In the above circumstances, the petition deserves to be allowed and the proceedings requires to be quashed. Accordingly, the following order is passed.*
>
> *ORDER*
>
> *The petition is allowed. The complaint filed by the Senior Inspector, 5th Circle, Karmika Bhavana, Bengaluru, in C.C. No.10137/2018 pending on the file of the Metropolitan Magistrate, Traffic Court–I, Bengaluru and all further proceedings therein are hereby quashed. However, liberty is granted to the complainant to file a complaint afresh if advised, after curing the defects, in accordance with law.*
>
> *In view of disposal of this case, the application-IA No.1/2018 filed for stay, does not survive for consideration. Accordingly, the said application stands disposed of."*

Here again, the Directors of the Company were directed to be made parties as the representative cannot be fastened with criminal liability for violation of Payment of Wages Act.

It is in the case of ***JOSEPH ZACHARIAH*** *(supra)* a Co-ordinate Bench of this Court considers the provisions of the **Factories Act, 1948** *qua* the maintainability, wherein this Court holds as follows**:**

"4. Shri. Prabhakar Rao made following submissions:

that the private complaint is filed by Assistant Director of Factories in C.C.No.37374/2011 is not maintainable inasmuch as the Company has not been arrayed as an accused which is contrary to law laid down by the Supreme Court of India in Aneeta Hada Vs. Godfather Travels and Tours (P) Ltd. (2012)5 SCC 661.

- *that C.C.No.36781/2011 is not maintainable inasmuch as the State through the Assistant Director of Factories have initiated proceedings against the occupier and manager of the factory. Therefore, prosecution initiated pursuant to complaint lodged by the District Fire Officer is not maintainable because accused would be exposed to double jeopardy.*

- *that even in the FIR registered by the District Fire Officer, the company is not arrayed as accused.*

5. He placed reliance upon decision of this Court in Crl.P.No.201009/2014 dated 21.04.2016 in the case of M. Zakir Ahmed Vs. State of Karnataka.

6. The facts mentioned herein above are not disputed by the learned HCGP.

7. I have carefully considered the submissions of learned advocate for the petitioners and learned HCGP and perused the material papers on record.

8. Admittedly, State have initiated action by filing complaint through the Assistant Director of Factories in C.C.No.37374/2011 by filing a private complaint. Admittedly, the Company has not been made as a party in the said private complaint. Learned advocate for the petitioners is right in his submission that the private complaint is contrary to the law laid

down by the Supreme Court of India in Aneeta Hada. This Court in Criminal Petitions No.2869/2018, 2870/2018 and 2871/2018, has quashed the proceedings by following the authority in Aneeta Hada by granting liberty to the complainant to file a fresh complaint after curing the defects in accordance with law.

10. The State having initiated the proceedings to prosecute the accused for the offence punishable under Section 92 of the Factories Act cannot maintain parallel proceedings pursuant to FIR No.434/2011 as it amounts to prosecuting accused for the same offence more than once.

11. In the circumstances, these petitions merit consideration. Hence, the following:

ORDER

(i) Petitions are allowed.

(ii) Proceedings in C.C.No.36781/2011 in Crl.P.No.7666/2018and C. C .No. 37374 / 2011 in Crl.P.No.9374 / 2016 pending on the file of 7th Additional Chief Metropolitan Magistrate, Bengaluru are quashed so far as the petitioners in respective cases are concerned with liberty to the complainant to file fresh complaint after curing the defects in accordance with law.

No costs."

The Factories Act is considered *qua* the maintainability following the earlier judgments in several criminal petitions as

can be found at paragraph 8 of the judgment and is held that the judgment in ***ANEETA HADA*** would bind the Court insofar as the Company not being made a party for an FIR to be registered. It is held that the said finding having vitiated the proceedings to prosecute the accused for the offence punishable under Section 92 of the Factories Act, a parallel proceeding pursuant to an FIR was not maintainable.

All these judgments are followed in the case of ***MANI K.THOMAS*** *(supra)*. ***MANI K.THOMAS*** was concerning initiation of proceedings under Section 22A of the ' **Minimum Wages Act**, **1948**'. Therefore, all the judgments relied on by the learned senior counsel were following ***ANEETA HADA*** and interpreting relevant provisions of respective enactments which require the Company to be arrayed as a party.

12. The provisions of the Factories Act stand on a different footing. It becomes necessary to consider the judgment of the Apex Court in the case of ***J.K. INDUSTRIES LIMITED*** *(supra)*. It

is germane to notice the same in extenso. Paragraph-2 narrates the facts that led to filing of appeals before the Apex Court and reads as follows:

> *"2. In this batch of cases, both in the writ petitions and in the appeals by special leave, short facts, which are not in dispute and are relevant for the discussion hereinafter, are that the Chief Inspector of Factories called upon the petitioners/appellants to file applications seeking renewal of the registration of licence of their respective factories, signed by a director of the company in his capacity as the occupier of the factory and stated that a nominee of the Board of Directors, other than a Director, could not make such an application as an occupier. The correctness of that direction/opinion has been put in issue in all these cases. The petitioners/appellants have also called in question the constitutional validity of proviso (ii) to Section 2(n) of the Factories Act, 1948 (hereinafter referred to as 'the Act') as amended by Act 20 of 1987, as violative of Articles 14, 19(1)(g) and 21 of the Constitution of India."*

Paragraph 14 considers the purport of the Factories Act. Paragraph 16 deals with objects and reasons of Amendment Act 20 of 1987. Paragraphs 17 and 18 deal with the offence under Section 7. Paragraph 19 interprets Section 7-A. The question that the Apex Court seeks to answer is found at paragraph 32. Paragraph 37 is examination of the Factories Act. Paragraph 62 is where the Apex Court sums up its conclusions. All the aforesaid paragraphs read as follows:

"14. The 1948 Act is an act to consolidate the law regulating factories. It is a piece of social welfare legislation enacted primarily with the object of protecting workmen employed in factories against industrial and occupational hazards. It seeks not only to ensure that workers would not be subjected to long hours of strain but also that employees should work in safe, healthy and sanitary conditions and that adequate precautions are taken for their welfare and safety. The stringent provisions relating to the obligations of the occupiers or managers with a view to protect workers and to secure to them employment in conditions conducive to their health and safety indicate the broad purpose of the Act. The Act and the Rules made there under impose numerous restrictions upon the occupier or manager of the factory to ensure to workers adequate safeguards for their health and physical well-being and to secure to them safe and healthy conditions at the place of work. The 1948 Act was amended by Act 94 of 1976, with a view to remove some lacunae relating to the definition of 'workers' and for improvement of the provisions in regard to safety of workers and appointment of safety officers and to provide for an enquiry in every case of a fatal accident. Some difficulties experienced in the administration of the 1948 Act even after the 1976 Amendment, specially those relating to hours of employment, safety conditions and development of appropriate work culture conducive to safety and health of workers particularly in case of factories which deal with hazardous materials and the escape routes which the employers had found to shift their responsibilities on some employee or the other and escape punishment and penalty, which were also noticed in certain judgments of this Court, led Parliament to amend the Act in 1987 which inter alia amended Section 2(n), deleted Section 100 and incorporated Sections 7, 7-A, Chapter IV-A, Section 104-A and Section 106-A, besides certain other provisions.

... ...

16. It was, thereafter, that Parliament stepped in and passed the Amendment Act 20 of 1987, which as

already noticed, besides amending the definition of an occupier under Section 2(n) of the Act by addition of various provisos thereto also made some more significant changes in the Act. The Statement of Objects and Reasons of Amendment Act 20 of 1987, reads:

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

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

(3) Opportunity has been availed of to make the punishments provided in the Act stricter and certain other

amendments found necessary in the implementation of the Act."

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

*20 of 1987 [**Ed.**: S. 7 was a pre-existing provision when Amending Act 20 of 1987 was enacted and is neither amended by it.].*

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

"7. (1) The occupier shall, at least fifteen days before he begins to occupy or use any premises as a factory, send to the Chief Inspector a written notice containing––

(a) the name and situation of the factory;

(b) the name and address of the occupier;

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

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

(d) the nature of the manufacturing process—

(i) carried on in the factory during the last twelve months in the case of factories in existence on the date of commencement of this Act; and

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

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

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

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

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

(i) such other particulars as may be prescribed.

***

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

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

(a) the provisions and maintenance of plant and systems of work in the factory that are safe and without risks to health;

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

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

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

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

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

19. Under Section 7, a notice is required to be given to the Chief Inspector, disclosing the name of the occupier at least fifteen days before he occupies or begins to use any premises as a factory. It also requires the disclosure of the name of the owner of the premises or building and the name and particulars of the Manager. Section 7-A prescribes the duties of the occupier. The provisions of

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

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

... ...

32. It is in the light of the above-settled principles that we shall consider the true scope and intent of Section 2(n) with reference to proviso (ii) thereto within the scheme of the Act. Can Section 2(n) stand without proviso (ii) in the case of a company? What is the true function of proviso (ii) to Section 2(n)?

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

... ...

62. To sum up our conclusions are:

(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;

(2) Where the company fails to nominate one of its Directors as the occupier of the factory, the Inspector of Factories shall be at liberty to proceed against any one of the Directors of he company, treating him as the deemed occupier of the factory, for

prosecution and punishment in case of any breach or contravention of the provisions of the Act or for offences committed under the Act;

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

(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."

(Emphasis supplied)

Summing up the conclusions, the Apex Court unequivocally holds that in case of a Company which owns the factory it is only one of the Directors of the Company who can be notified as the occupier of the factory for the purpose of the Factories Act and the Company cannot nominate any other employee to be the occupier of the factory. Where the Company has failed to nominate one of its Directors as occupier of the factory, the

Inspector of Factories shall be at liberty to proceed against any one of the Directors treating him as deemed occupier of the factory for the purpose of prosecution and punishment.

13. The case at hand is whether one of the Directors of the Company is shown to be the occupier. Therefore, in the judgment in the case of ***J.K. INDUSTRIES LIMITED***, the Director is the occupier and the occupier is the representative of the Company. The Company under the Factories Act need not be made an accused as there is no provision under the Factories Act, akin to Negotiable Instruments Act, Equal Remuneration Act, Payment of Gratuity Act, Payment of Wages Act and Minimum Wages Act. Reference to the judgment of the Apex Court in the case of ***Haryana Financial Corpn. v. Jagdamba Oil Mills***[5] in the circumstances is apposite, wherein the Apex Court holds that a precedent should not be blindly followed. Paragraphs 20-22 of the judgment of the Apex Court reads as follows:

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[5] ***(2002)3 SCC 496***

"19. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. ***Observations of courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear.*** *Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark upon lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes, their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. v. Horton [1951 AC 737 : (1951) 2 All ER 1 (HL)] (at p. 761) Lord MacDermot observed : (All ER p. 14C-D)*

"The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge."

20. In Home Office v. Dorset Yacht Co. [(1970) 2 All ER 294 : 1970 AC 1004 (HL)] Lord Reid said (at All ER p. 297g-h), "Lord Atkin's speech … is not to be treated as if it were a statutory definition. It will require qualification in new circumstances". Megarry, J. in (1971) 1 WLR 1062 observed:"One must not, of course, construe even a reserved judgment of even Russell, L.J. as if it were an Act of Parliament." And, in Herrington v. British Railways Board [(1972) 2 WLR 537 [sub nom British Railway Board v. Herrington, (1972) 1 All ER 749 (HL)]] Lord Morris said : (All ER p. 761c)

"There is always peril in treating the words of a speech or a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial

utterances are made in the setting of the facts of a particular case."

21. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

22. The following words of Hidayatullah, J. in the matter of applying precedents have become locus classicus : (Abdul Kayoom v. CIT [AIR 1962 SC 680] , AIR p. 688, para 19)

"19. ... Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

"Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."

(Emphasis supplied)

Thus, the judgments rendered by the Co-ordinate Benches of this Court *(supra)* or the case of ***ANEETA HADA*** would not be applicable to the facts of the case at hand or even the statute that has fallen for consideration in the case at hand. The

Factories Act as held by the Apex Court in the case of ***J.K. INDUSTRIES LIMITED*** is a complete code by itself. Therefore, the interpretation rendered by the Apex Court in the case of ***J.K. INDUSTRIES LIMITED*** interpreting the Factories Act would be applicable to the case at hand and not the ones that are relied on by the learned Senior Counsel.

14. Section 2(n) of the Factories Act and its proviso makes it clear that one of the Directors of the company would be responsible for proper implementation of the provisions of the Act. This ensures that more care is taken for the maintenance of the factory and various safety measures prescribed under the Act, so that the health, welfare and safety of the workers are not neglected. It is the occupier who would become responsible for all such acts of a factory. It is not in dispute that the petitioner is the occupier of the factory against whom the allegation is now made. He is the one who exercises ultimate control over the affairs of the factory. The ultimate control exercised over the affairs of the factory cannot be equated with the ultimate control

over the affairs of the company. The affairs of the factory relate to the manner in which the factory is to be run and the violation relates to the violations of the Factories Act. A parallel with the judgments rendered interpreting the afore quoted provisions cannot be made applicable to the case at hand. Therefore, the first point that has arisen for my consideration is answered against the petitioner.

Point No.2: *Whether an order is required to be passed under Section 7A(2)(c) of the Factories Act, on the reply submitted to the show cause notice to enable the occupier to file an appeal under Section 107 of the Factories Act before registration of the criminal case?*

15. The offence alleged against the petitioner is with regard to the violation of Section 7A(2)(c) of the Factories Act, which reads as follows:

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

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

(a) the provisions and maintenance of plant and systems of work in the factory that are safe and without risks to health;

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

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

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

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

(Emphasis supplied)

Section 7A(2)(c) of the Factories Act does not require an order to be passed for the alleged offence.

Section 107 of the Factories Act deals with appeals that can be filed against the orders passed in writing by an Inspector under the provisions of the Factories Act. Section 107 reads as follows:

*"**107. Appeals**.—(1) The manager of a factory on whom an order in writing by an Inspector has been served under the provisions of this Act or the occupier of the factory may, within thirty days of the service of the order, appeal against it to the prescribed authority, and such authority may, subject to rules made in this behalf by the State Government, confirm, modify or reverse the order.*

(2) Subject to rules made in this behalf by the State Government (which may prescribe classes of appeals which shall not be heard with the aid of assessors), the appellate authority may, or if so required in the petition of appeal shall, hear the appeal with the aid of assessors, one of whom shall be appointed by the appellate authority and the other by such body representing the industry concerned as may be prescribed:

Provided that if no assessor is appointed by such body before the time fixed for hearing the appeal, or if the assessor so appointed fails to attend the hearing at such time, the appellate authority may, unless satisfied that the failure to attend is due to sufficient cause, proceed to hear the appeal without the aid of such assessor or, if it thinks fit, without the aid of any assessor.

(3) Subject to such rules as the State Government may make in this behalf and subject to such conditions as to partial compliance or the adoption of temporary measures as the appellate authority may in any case think fit to impose, the appellate authority may, if it thinks fit, suspend the order appealed against pending the decision of the appeal."

Section 107 gives a right to the occupier to file an appeal against an order that would be passed as mandated under certain provisions of the Factories Act. Therefore, Section 107 directs that an occupier of a factory on whom an order in writing by an

Inspector has been served, the occupier of the factory may within 30 days of the service of the order, appeal against it to the prescribed authority and the authority subject to Rules made in this behalf modify or reverse the order. Therefore, emphasis under Section 107 of the Factories Act is an order in writing to be passed by the Inspector and the same to be served under the provisions of the Factories Act.

16. The allegation against the petitioner, as stated hereinabove, is violation of Section 7A(2)(c) of the Factories Act which does not require an order to be passed in writing or the same to be communicated to the occupier. Sections 15, 38, 39 and 40 of the Factories Act speak of an order to be passed in writing by the Inspector and to be served upon the occupier of the factory. Sections 15(3), 38(1), 39 and 40(2) of the Factories Act read as follows:

> *"15.* ***Artificial humidification****.—(1) In respect of all factories in which the humidity of the air is artificially increased, the State Government may make rules,-*
>
> *... ... ...*
>
> *(3) If it appears to an Inspector that the water used in a factory for increasing humidity which is required to be*

effectively purified under sub-section (2) is not effectively purified he ***may serve on the manager of the factory an order in writing, specifying the measures which in his opinion should be adopted, and requiring them to be carried out before specified date.***

... ...

38. ***Precautions in case of fire****---(1) In every factory, all practicable measures shall he taken to prevent outbreak of fire and its spread, both internally and externally, and to provide and maintain-*

(a) safe means of escape for all persons in the event of a fire, and

(b) the necessary equipment and facilities for extinguishing fire.

.. ..

39. ***Power to require specifications of defective parts or tests of stability****.—If it appears to the Inspector that any building or part of a building or any part of the ways, machinery or plant in a factory is in such a condition that it may be dangerous to human life or safety,* ***he may serve on the occupier or manger or both of the factory an order in writing requiring him before a specified date-***

(a) to furnish such drawings, specifications and other particulars as may be necessary to determine whether such building, ways, machinery or plant can be used with safety, or

(b) to carry out such tests in such manner as may be specified in the order, and to inform the Inspector of the results thereof.

40. Safety of buildings and machinery.-(1)... ...

(2) If it appears to the Inspector that the use of any building or part of a building or any part of the ways,

> *machinery or plant in a factory involves imminent danger to human life or safety,* ***he may serve on the occupier or manager or both of the factory an order in writing prohibiting its use until it has been properly repaired or altered."***
>
> *(Emphasis supplied)*

Therefore, if an order is not obligatory to be passed under the statute, no appeal would lie against the offence alleged under Section 7A(2)(c) of the Factories Act as is alleged in the case at hand. It is trite law that remedy of appeal is a creature of the statute. The Factories Act restricts an order to be passed only in certain circumstances as narrated *(supra)* and only against an order that is to be passed an appeal remedy is available. The inevitable inference that can be drawn is Section 107(1) of the Factories Act contemplates appeal from an order in writing by an Inspector served on the occupier under Sections 15(3), 38(1), 39 and 40(2) of the Factories Act *(supra)*. Therefore, the plea that a right of appeal is *lost* is also *lost* by the learned Senior Counsel. Therefore, the second point that has arisen for consideration is also answered against the petitioner.

17. In view of preceding analysis, I do not find any ground to interfere with the proceedings initiated against the petitioner in terms of the Factories Act, 1948 and accordingly, the writ petition stands dismissed.

Sd/-
JUDGE

bkp
CT:MJ