

GAHC010005372012



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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Rev.P./231/2012

KISHORE PRASAD SARAF and ANR.
S/O LT. KEDAR NATH SARAF R/O JALAN NAGAR NORTH, P.O. and P.S.
JALAN NAGAR, DIST. DIBRUGARH, ASSAM,

2: SRI ASHOK SOOD
S/O LT. RAMSARUP SOOD
R/O SOUTH JALAN NAGAR
P.O.
P.S. and DIST. DIBRUGARH
ASSA

VERSUS

THE STATE OF ASSAM

Advocate for the Petitioner : MR.P J SAIKIA, MR.A K GUPTA,MS.J SAIKIA

Advocate for the Respondent : , PP, ASSAM,

BEFORE
HON'BLE MRS. JUSTICE MITALI THAKURIA

Advocates for the Petitioners : Mr. K. J. Saikia.
Advocates for the Respondent : Mr. P. Borthakur,
Addl. P.P., Assam.

Date on which judgment is reserved : **26-03-2026**

Date of pronouncement of judgment : **20-05-2026**

Whether the Pronouncement is of the operative part of the judgment? : N/A

Whether the full judgment has been pronounced? : Yes

JUDGMENT & ORDER (CAV)

Heard Mr. K. J. Saikia, learned counsel for the petitioners and Mr. P. Borthakur, learned Additional Public Prosecutor, Assam for the State.

2. This appeal has been filed under Section 401/397 CrPC challenging the judgment and order dated 10.02.2012, passed by the learned Additional Sessions Judge (FTC), Dibrugarh in Cri. Appeal No. 17(3)/2010 affirming the conviction passed by the learned Chief Judicial Magistrate, Dibrugarh vide judgment and order dated 16.08.2010, passed in G.R. Case No. 205^c/2006.

3. The brief facts of the case is that on 16.10.2005, the workman Dukhiram Lohar while was doing the work of feeding green tea leaves into

the Rotervane machine on first bent of C.T.C., in Jalan Nagar South Tea Estate Factory fell down inside the said Rotervane machine and died immediately. The matter was immediately informed to the Inspector of Factories, who made an enquiry and accordingly came to the conclusion that the occupier and the manager did not take any measure for covering or fencing the open space of the floor under which the Rotervane machine was installed and as a result of which the worker Dukhiram Lohar fell down and died.

4. Thereafter, the Inspector of Factories filed his Offence Report before the learned CJM, Dibrugarh and accordingly a complaint was registered under Complaint Case No. 205^c/2006.

5. The petitioners being the Occupier and Manager, after the death of the deceased had paid Rs. 1,39,614/- to the wife and dependents of the deceased under the provisions of Workmen's Compensation Act and funeral expenses of the deceased were also paid to the wife of the deceased. More so, wife of the deceased was also given employment in the Tea Estate.

6. The Court accordingly took cognizance of the offence under Section 92 of the Factories Act and also under Rule 3 of Sub Section 6(1) and Section 32(a) and Section 33(1) of the Factories Act against the petitioners. On receipt of summons they accordingly appeared before the Court and the particulars of offence was also explained to the accused petitioners, to which they pleaded not guilty and claimed to be tried.

7. During trial, the prosecution has examined four witnesses and defence also adduced the evidence of two witnesses. Petitioners were also examined under Section 313 CrPC to which they have also pleaded not guilty. Thereafter, hearing the arguments submitted by the learned counsel for the

parties, the learned Trial Court vide its judgment and order dated 16.08.2010 had convicted the petitioners under Section 92 of the Factories Act and sentenced them to undergo S.I. for 2 years along with a payment of compensation of Rs.50,000/- each.

8. On being aggrieved and dissatisfied with the said judgment and order passed by the learned CJM, Dibrugarh, the petitioners preferred an appeal before the learned Sessions Judge, Tinsukia, which was transferred to the Court of learned Additional Sessions Judge (FTC), Dibrugarh which was reregistered and numbered as CrI. A. No. 17(3)/2010. After hearing the submission made by the learned counsel for the parties, the learned Appellate Court vide its judgment and order dated 10.02.2012 affirmed the conviction and modified the sentence to the extent for payment of compensation of Rs.50,000/- each by the petitioners.

9. On being aggrieved and dissatisfied with the judgment and order passed by the learned Appellate Court, this revision petition has been preferred by the petitioners.

10. Mr. Saikia, learned counsel for the petitioners submitted that both the Courts below committed gross illegality and material irregularity and did not pass the order under the provision of law and for which the judgments are liable to be set aside and quashed.

11. He further submitted that the learned Trial Court had passed the order without appreciating the evidence of all the witnesses in its true perspective and recorded the order of conviction against the petitioners. The learned Trial Court as well as Appellate Court had failed to consider the fact that there is no ingredient to constitute any offence under Section 92 of the Factories Act and thus, the judgment passed by the learned Appellate Court is highly illegal

and liable to be set aside.

12. He submitted that Rule 3-A provides for obtaining previous permission from the Chief Inspector of Factories for installation of additional machineries exceeding the horsepower already installed in the factory. In the instant case, there being no such exceeding of the permitted horsepower in the factory and approved Surveyor himself took the plan to the Inspector of Factories on 15.07.2005 in a routine manner, which was not rejected and as such the permission even though not required under the law was not rejected and hence it was presumed to have been granted under Section 6(2) of the Act. But the learned CJM, Dibrugarh while passing the order failed to consider that Exhibit-Kha was sent on 15.07.2005 and held that the machine was working without approval. But the provision was not taken into consideration by the learned CJM as well as by the learned Appellate Court, while passing the judgment and order of conviction.

13. Mr. Saikia, learned counsel for the petitioner further submitted that the learned Trial Court also failed to scrutinize the evidences on record in its true perspective and failed to consider the fact that there was no negligence and fault on the part of the petitioners as specific protective measures required to be taken on the platform for operating the machine had been taken which were approved by the Surveyor of the Inspector of Factories.

14. DW-2 also categorically stated in his evidence that "whatever guard is required to be taken on the machines were there". But inspite of all these the workman died due to an accident which was also confirmed by the Magistrate and police while conducting enquiry immediately after the accident.

15. The learned CJM only relied on the offence report and the statement of PW-2, Inspector while passing the judgment holding that, at the time

incident, the mouth of the Rotervane machine was open and no safety measure was taken by the manager or occupiers of the said company. But the statement of PW-2 is unreliable and only on the basis of some presumption, PW-2 had made such statement before the Court.

16. It is further submitted by Mr. Saikia, learned counsel that the petitioner No.1 was considered to be the occupier of the Jalan Nagar Tea Estate without any evidence in record wherein it is categorically deposed by the accused petitioner No.2 that Sri Ashok Sood that the petitioner No.1 was one of the Executive Director of the Estate and resides therein who is/was neither the owner nor the occupier within the meaning of Section 93 of the Factories Act and as such, the conviction so far as petitioner No.1 is concerned is wholly illegal and not tenable in the eye of law.

17. He further submitted that two month prior to the said incident prayer for approval was made before the authority concerned and it was deemed to be approved as the horsepower was not exceeding for installation of the said Rotervane Machine in the company. The machine was also properly guarded with fencing and the unfortunate incident had happened only accidentally while the deceased was working in front of the Rotervane Machine.

18. He further submitted that the learned Trial Court had come to its own finding without any supportive evidence and without considering the evidence of the DWs wherein it was stated that the machine was properly guarded and the incident had happened unfortunately. At the time of arguments, learned counsel for the petitioner also stressed on the term occupier as per Section 2 sub Section (n) of the Factories Act and also emphasized on Rule 3 A of Assam Factories Rule. He further submitted that as the application was made two months prior to the date of incident, though the application for approval was not acted upon, it can be deemed to be approved from the authority

concerned and at best it can be termed as an accident, where there was an unfortunate death of a worker while he was working in the factory.

19. To substantiate the plea the learned counsel for the petitioner also relied on a decision of this Court in the case of **Durga Dutta Tiwari Vs. State of Assam and another** reported in **2004 (supp) GLT 401** and basically emphasized on para 5, 6 and 7, which read as under:

“5. Admittedly, the sole prosecution witness P W1 was not present when the incident took place. As per his own statement, he visited the site subsequently and on the basis of the statement made by the workers and other witnesses, he submitted the offence report. Surprisingly enough, none of these persons or witnesses were cross examined by the prosecution during trial and when the lacuna was brought to the notice, the same was brushed aside without any finding. Admittedly, the P.W. 1's evidence is hearsay evidence as he learnt the incident from other witnesses and it is not admissible in evidence in criminal trial.

6. The trial court has acted on the evidence of P.W.-1 wherein it was stated that the rope used for lifting the portion of the chimney was not of required standard or it was not of standard specification etc. Admittedly, none of these articles were examined by the experts and there is no report of the experts to show that the said accessories/tools used for the purpose of lifting the chimney were not as per specifications required u/s 29 of the Factories Act. Further, the complainant did not produce these articles before the court to show that these were not in conformity with the required specification. The mere statement of the complainant that he found the rope etc. to be of not required standard or quality cannot form basis for conviction as he arrived at the place of occurrence subsequently. It seems that the complainant was in hurry in taking up matter in discharge of his duties as required under the Act. We may refer to the provisions of Section 91 of the Factories Act which provides that an Inspector may at any time take samples and get the things examined or analyzed by any Government Analyst. Admittedly, P.W.-1 did not perform his duties as required.

7. In this case, we find that there is another aspect of the matter which was given complete go-bye by both the trial court as well as the appellate court. As per the prosecution story itself the said chimney was dismantled for the purpose of repairing which means that the chimney was lifted and brought to the ground for the purpose of repairing. It seems that during the process of dismantling and lifting of the chimney, there was no mishap. Further, we find from the P.W.-1's own evidence that one portion of the chimney was successfully installed and the accident took place when the second part of the chimney was being placed. All these things go to show that the apparatus used for the purpose of lifting the chimney was of required strength and we find force in the submission that the incident was because of an accident only and there was no negligence on the part of the management. There cannot be presumption of things that the rope used was not of required specification etc. The burden was on the prosecution and admittedly, the prosecution has failed to discharge the same.”

20. He cited another decision of this Court in the case of **Wimco Limited**

and Another Vs. Union of India and others reported in **1994 2 GLR 37** wherein discussion has been made in regards to the term "occupier" under Section 2(n) of the Factories Act and basically he relied on para 9 (iii) of the said judgment which read as under:

*"9 (iii) The only question which requires determination is whether any person other than the director of the company can be an **occupier** under Section 2(n) of the **Factories Act** and to that question our answer is in the affirmative. In our judgment, the Inspector of **Factories** was clearly in error in claiming that after amendment of Section 2(n) of the **Factories Act** no one except a director of the company can be an **occupier**."*

21. He further submitted that in the said judgment it has also been held that a bare reading of Section 2(n) as amended will show that the material part of the section defining an occupier remains unaltered and so a person who has the ultimate control of the factory can be nominated as the occupier and it also must be borne in mind that always a director may not be the ultimate control of the factory.

22. Citing the above referred judgment, learned counsel for the petitioners submitted that the judgment and order passed by the learned Trial Court as well as by the learned Appellate Court is liable to be set aside and quashed.

23. Mr. Borthakur, learned APP submitted that the scope under the revisional jurisdiction is very limited, wherein there was concurrent findings of the learned Trial Court as well as the Appellate Court. He further submitted that before installation of the Rotervane Machine, it is seen from the evidence as well as from the observation made by the learned Trial Court as well as by the Appellate Court that even there was no application pending for approval before installation of the Rotervane Machine as required under the Factories Act.

24. Mr. Borthakur, learned APP submitted that both the accused petitioner

Nos. 1 and 2 are the Director and Managing Director and thus, they can be termed as occupier of the company who is responsible for all affairs of the factory.

25. From the evidences of the PWs it is seen that there was no safety measures taken at the time of installation of the Rotervane Machine and in a very unsafe condition the workers were working with the Rotervane Machine and the mouth of the Rotervane Machine was also found to be open at the time of the alleged incident. Mr. Borthakur, accordingly submitted that no illegality or irregularity has been committed neither by the learned Trial Court, nor by the learned Appellate Court, who arrived at a concurrent findings and hence, no interference is called for from this Court.

26. Heard the submissions made by the learned counsel for the parties and I have also perused the case record, the evidences on record as well as the judgments passed by the learned Trial Court as well as by the learned Appellate Court.

27. It is the case of the petitioners that all safety measures were taken at the time of installing the Rotervane Machine and as per Rule 3-A the previous permission is required from the Chief Inspector of Factories for installation of additional machineries exceeding the horse power already installed in the Factory. But in the instant case there was no such exceeding of permitted horse power in the factory approved by the Surveyor himself. However, in a routine manner an application was submitted which was not rejected and hence it can be well presumed that it has been accepted or the permission was approved and accordingly, the Rotervane Machine was installed though there was no proper approval from the Chief Inspector of Factories. It is the further case of the petitioners that the learned Trial Court had passed the order of conviction which has been upheld by the learned Appellate Court

only on the basis of the statement made by PW-2, but the learned Trial Court did not consider the evidence of DW-2, who categorically deposed before the Court that the Rotervane Machine was well guarded at the time of the incident and it had happened merely due to an accident.

28. Mr. Saikia, learned counsel for the petitioners also raised the issue in regards to the terms 'Occupier' and basically stressed that both the petitioner Nos. 1 and 2, specially the petitioner No.1 cannot be considered as the occupier of the factory and he was only an Executive Director of the Estate. But from the investigation report and the evidence of the PW-2 it reveals that there was wooden floor with three sides fencing and one side was open for lifting tea leaves to the floor from below. The Rotervane Machine was under the wooden floor and the mouth of the Rotervane Machine was installed on a square hole on the floor and there is no evidence that the mouth of the Rotervane Machine was guarded by any fencing.

29. From the evidence of the eye witnesses also it is seen that there was no fencing and safety guard on the hole of the wooden floor and the mouth of the Rotervane Machine in open condition without any fencing and while the deceased was working with the Rotervane Machine, giving tea leaves on the mouth of the Rotervane Machine, the unfortunate incident had happened as there was no fencing over the Rotervane Machine as a protective measure and hence, suddenly slipped and his head got crushed in the Rotervane Machine and he died instantly.

30. Further, it is the claim of the petitioners that they are not at all responsible for the accident wherein the deceased died while working with the Rotervane Machine. It is the claim of the petitioners that they provided proper guard to the hole for protection of the workers and took all precautionary measures providing the guard and fencing, but it is seen that

they could not describe as to how the deceased worker fell down inside the Rotervane Machine and his head got crushed as described by the accused manager in his accident report in Form-18. Had there been any guard or fencing in the Rotervane Machine, the incident would not have happened wherein a worker died instantly due to crushing of his head inside the Rotervane Machine. The DW-2 also failed to disclose as to how the deceased fell on the hooper of the Rotervane Machine and said unfortunate incident took place except the plea that proper precautionary measures were taken. Both the DWs failed to disclose the fact as to how the unfortunate incident had happened inspite of having proper guard/fencing on the mouth of the Rotervane Machine. Rather from the evidence of the DW-2 it is seen that the factory inspector investigated the site in his presence and accordingly prepared the investigation report. PW-2, the complainant himself has proved his investigation report during investigation wherefrom it is seen that one side of the Rotervane Machine was found without any fencing and the mouth of the Rotervane Machine was also not properly guarded/fenced as a precautionary measure for the workers.

31. It is also claimed by the accused petitioners that prior approval was there before installation of the Rotervane Machine. However, it is admitted that the approval letter was not received by the factory, though two months prior to the installation of the Rotervane Machine, the application was filed before the Chief Inspector of Factories for approval of the same. As it was not rejected, it is deemed that there was proper approval for installing the new machine, i.e., the Rotervane Machine in the factory. But from the evidence of DW-2 it is seen that he exhibited the letter for approval as Ext.- Ka and Ext.- Kha through which the layout was sent for approval. He also exhibited the letter dated 17.10.2005 to the Chief Inspector of Factories, i.e., the letter for approval. But in the discussion made by the learned Trial Court below as well

as after perusal of the exhibits it is stated that through Ext. Kha it was applied for approval of layout on 16.07.2005 and the Chief Inspector of Factories accepted the state for approval of the layout only on 24.10.2005, but the unfortunate incident had occurred on 16.10.2005, from which it appears that there was no approval of layout on the date of incident and there is no evidence that at the time of accident the layout plan of installation of Rotervane Machine in the factory was pending the Chief Inspector of Factories.

32. Thus, it is seen that even before the sending the letter for approval, the Rotervane Machine was installed in the factory and on the date of the incident there was no pending approval before the Chief Inspector of Factories. Thus, without any proper approval or without any proper intimation to the Chief Inspector of Factories, there was installation of the Rotervane Machine wherein the unfortunate incident had happened on 16.10.2005.

33. The Apex Court in catena of decisions have held that Section 92 is a perfectly valid piece of legislation insofar as it makes the occupier or manager of a factory guilty of an offence for contravention of any of the provisions of the Act or the Rules made thereunder which can be reiterated from the Section itself. Section 92 of the Act, reads as under:

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

34. Coming to the issue raised by the learned counsel for the petitioners in regards to term occupier, it is seen that these two petitioners are the

Executive Director and Manager of the company and thus, they can be termed as the occupier and manager of the factory, who could be held guilty for any offence under Section 92 of the Factories Act in terms of Section 2(n) of the Factories Act. It is an admitted fact that both the petitioner Nos. 1 and 2 are responsible for all affairs of the company and they are working as manager and occupier of the company and hence, they come within the definition of occupier as per Factories Act. Thus, these two petitioners are found responsible for all affairs of the factory and they are supposed to take all precautionary measures for safety of the workers in the company while working in any machines.

35. Section 2(n) of the Factories Act, 1948 reads as under:

“2(n) “occupier” of a factory means the person who has ultimate control over the affairs of the factory,

Provided that—

(i)in the case of a firm or other association of individuals, any one of the individual partners or members thereof shall be deemed to be the occupier;

(ii)in the case of a company, any one of the directors shall be deemed to be the occupier;

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

36. So from reading of the definition of “Occupier” under Section 2(n) of the Act read with second provision, it is clear that in the case of a company, the Directors shall be deemed to be an Occupier. More so as per Section 2(n), “Occupier” of a factory means the person who has the ultimate control over the affairs of the company.

37. In the present case, it is also seen that there is no evidence that any other person except the Petitioners had control over the factory to be held as an “Occupier”. The Petitioners are the only persons who had the ultimate

control over the factory and thus they can be termed as “Occupier” of the company within the meaning of Section 2(n) of the said Act.

38. The Hon’ble Apex Court in the case of **J.K. Industries & Ors Vs. Chief Inspector of Factories and Boilers & Ors. reported in (1996) 6 SCC 665** has held that *“legislature wanted to bring in a sense of responsibility in the minds of those who have the ultimate control over the affairs of the factory, so that they take proper care for maintenance of the factories and the safety measures therein. The fear of penalty and punishment is bound to make the Board of Directors of the company more vigilant and responsive to the need to carry out various obligations and duties under the Act, particularly in regard to the safety and welfare of the workers. Proviso (ii) was introduced by the Amending Act, couched in a mandatory form --- “any one of the directors shall be deemed to be the occupier” --- keeping in view the experience gained over the years as to how the directors of a company managed to escape their liability, for various breaches and defaults committed in the factory by putting up another employee as a shield and nominating him as the ‘occupier’ who would willingly suffer penalty and punishment..... Proviso (ii) now makes it possible to reach out to a director of the company itself, who shall be prosecuted and punished for breach of the provisions of the Act, apart from prosecution and punishment of the Manager and of the actual offender. The proviso, by making one of the directors of the company responsible for proper implementation of the provisions of the Act, to a great extent ensures that more care is taken for the maintenance of the factory and various safety measures prescribed under the Act for the health, welfare and safety of the workers are not neglected. In the case of a company, the main part of Section 2(n) would not be workable unless that provision is read along with proviso (ii)”.*

39. From the judgments passed by the learned Appellate Court dated 10.02.2012 passed in CrI. A. 17(3)/2010 it is seen that the learned Appellate Court had already modified the sentence, as imposed by the learned Trial Court vide its judgment dated 16.08.2010, passed in G. R. Case No. 205^c/2006 and from the discussions made above, this Court is of the opinion that the judgment passed by the learned Appellate Court affirming the judgment of the learned Trial Court does not call for any interference from this Court and the petitioners are hereby directed to pay amount of Rs.50,000/- each as fine as directed by the learned Appellate Court.

40. This criminal revision petition is accordingly stands rejected.

41. Return the TCR forthwith.

JUDGE

Comparing Assistant