

(1967) 09 GUJ CK 0009
In the Gujarat High Court
Case No : Criminal Reference No. 6 of 1967

Assistant Commissioner of Labour, Ahmedabad (D.C. Choowala) and Another APPELLANT

Vs

Gujarat Paper Mills Ltd., Ahmedabad and Others RESPONDENT

Date of Decision : 21-09-1967

Acts Referred:

Industrial Disputes Act, 1947 — Section 29, 32

Citation : (1969) CriLJ 322 : (1968) 9 GLR 890 : (1968) 2 LLJ 630

Hon'ble Judges : J.M. Sheth, J

Bench : Single Bench

Judgement

1. This is a reference made by the learned Additional Sessions Judge, Ahmedabad Rural at Narol, Sri D. J. Dave, under S. 438 of the Criminal Procedure Code, recommending that the order, passed by the learned Judicial Magistrate, First Case, Narol, dated 14 September, 1966, in a Criminal Case No. 1184 of 1966, issuing the process, be quashed and the opponent-accused be acquitted.

2. The facts leading rise to this reference, are briefly stated as under.

Opponent 1 is Gujarat Paper Mills Ltd. Barejadi Opponent 2 is a managing director of the said mills and opponent 3 is a works manager of the said mills. The industrial tribunal had given an award in regard to a dispute between opponent 1 and the workmen employed by it on 23 October, 1961. The said mills, being dissatisfied with that award, had filed appeals in the Supreme Court of India. The appeals filed were Civil Appeals Nor. 943 and 944 of 1964, and on account of the settlement, the award came to be modified by the Supreme Court on 17 December, 1964. In view of that award, opponent 1 had to pay to the workers the bonus of the year 1957-58, and arrears of wages on 17 March and 17 February, 1965, respectively. As the amount was not paid accordingly, the Assistant Commissioner of Labour, the complainant, filed a criminal complaint, No. 1458 of 1965 against the present three opponent-accused, or a breach of the

term of the said award. The prosecution was for an offence punishable under S. 29 read with S. 32 of the Industrial Disputes Act, 1947, which will be hereinafter referred to as the Act. In that criminal case, they came to be convicted for the said breach on 30 March, 1966. Section 29 was amended on 19 November, 1965 and on account of that amendment, continuance of a breach was made punishable. The complainant, thereupon, filed the present prosecution against the said opponents. It was registered as a Criminal Case No. 1134 of 1966. It is dated 18 June, 1966. Process was ordered to be issued by the learned Judicial Magistrate, Narol. In that proceeding, the accused-opponents gave an application Ex. M. 2 on 12 August, 1966, that in view of the fact that the accused had been once tried and convicted for the offence in question, their fresh trial on the same facts for the same offence is barred under S. 403 of the Criminal Procedure Code. In the previous proceedings, the dates of the alleged offences were 17 February and 17 March, 1965, respectively. The amendment of the Act by Act No. 35 of 1965, dated 19 November, 1965, cannot apply to the present proceedings. Penal provisions cannot have any retrospective effect. The complaint, therefore, be dismissed and the accused be acquitted. The learned Judicial Magistrate, First Class, Narol, did not accept these contentions to be well-founded and eventually he dismissed the said application.

3. Being dissatisfied by that order, the accused-opponents filed a Criminal Revision Application No. 16 of 1966 in the Court of the Sessions Judge at Narol and the said revisional application came to be heard by the learned Additional Sessions Judge and he has made this reference under S. 438 of the Criminal Procedure Code.

4. The learned Government Pleader, Sri Sompura, appearing on behalf of the State, states that he concedes to the position that the penal amending Act cannot have any retrospective operation. He urged that in the instant case, there was no question of the amending Act to be given retrospective effect. The present prosecution was launched for the offence that has been committed by the accused-opponents by continuing a breach even after the order of conviction was recorded against them for a breach first time in a Criminal Case No. 1458 of 1965. That order of conviction was recorded on 30 March, 1966. Section 29 of the Act was amended on 19 November, 1965. By that amendment, a continuance of a breach is made punishable at law. As the breach in question continued even after the amending Act came into force and after the order of conviction was recorded for the breach of the terms of the award, a fresh offence was committed and it was committed after the amending Act came into force. It was, therefore, contended that even though such an amending Act would have a prospective operation, the offence in question having been committed, subsequent to the creation of such an offence, the learned Additional Sessions Judge is not justified in observing that for such an offence the opponents cannot be tried. He also contended that the offence in question was not the same offence for which the accused-opponents were tried and convicted. The present offence could be said to have been committed by the said opponents as they

continued the breach and that too, after the order of conviction was recorded. For the proof of the offence in question, the prosecution has to prove that there was a breach of the terms of award for which the prosecution was launched and conviction was recorded. It has further to prove that after that conviction was recorded, the breach has continued. He therefore, contended that the ingredients of the offence for which the accused-opponents were tried and the facts, were not the same as those of the offence in question.

5. The learned advocate, Sri Desai, in reply to the arguments advanced by the learned Government Pleader, Sri Sompura, urged that when the accused-opponents committed a breach of the terms of the award by not making payments on the due dates, namely, 17 February and 17 March, 1965, the breach was made punishable under this very S. 29 of the Act. It was a completed offence. It was not a continuing offence then. On completion of that offence, they were prosecuted and they have been convicted. As they have been convicted for the breach of the terms of the award and at the time that breach was committed, the continuance of the breach was not made punishable at law, by a subsequent amendment in that section by which the continuance of breach is made punishable, the accused-opponents cannot be said to have committed a fresh offence for which they can be prosecuted and convicted. In short, his argument was that the amended S. 29 of the Act could apply to a case where a breach of the terms of the award has been committed first time after that amending Act came into force. For such a breach of the terms of the award committed subsequent to the date 19 November, 1965, a person committing that breach could be tried and convicted for the offence under S. 29 of the Act and if such a person, even after conviction, continues that breach, in view of the provisions of this amending Act, he could be further convicted for the continuance of that breach. If a person has committed a breach of the terms of the award, prior to the date the amending Act came into force, and if he is convicted for such an act, he has already suffered the consequences which were likely to issue at the time the breach was made punishable. By a subsequent amendment, he cannot be imposed with a fresh penal liability. He, therefore, contended that the reference made by the learned Sessions Judge should be accepted and the accused-opponents should be acquitted or the complaint filed against them by the complainant should be dismissed.

6. Before I advert to the rival contentions urged, I first propose to refer to S. 29 of the Act as it stood before its amendment made by the amending Act No. 35 of 1985, which came into force on 19 November, 1965 :

"Any person who commits a breach of any term of any settlement or award, which is binding on him under this Act, shall be punishable with imprisonment for a term which may extend to six months, or with fine, or with both, and the Court trying the offence, if it fines the offender, may direct that the whole or any part of the fine realized from him shall be paid, by way of compensation, to any person who, in its opinion, has been injured by such breach."

7. A perusal of that section indicates that as S. 29 stood prior to its amendment by the amending Act No. 88 of 1965, a breach of any term of any settlement or award, binding on that person under this Act, only was made punishable. The continuance of that breach was not made punishable then. It also further provided that the Court, if it finds the offender, could also direct the whole or any part of the fine, realized from the offender to be paid by way of compensation to a person, who, in its opinion has been injured by such breach. That latter part of section continues even after the present amendment in question. The power vested in the Court to direct that the whole or part of the fine, realized from the offender be paid by way of compensation to an injured person, in my opinion, does not help in deciding the question that is posed before me, either way. After the amending Act in question came into force, this amended S. 29 reads as under :

"Any person who commits a breach of any term of any settlement or award, which is binding on him under this Act shall be punishable with imprisonment for a term which may extend to six months, or with fine, or with both, and where the breach is a continuing one, with a further fine which may extend to two hundred rupees for every day during which the breach continues after the conviction for the first."

8. A plain reading of that amended section makes the position quite clear, that in a case where the breach is a continuing one, law has made provisions by this amendment in regard to this continuance of breach, after the conviction for a breach has been recorded; that act of continuing the breach is made further punishable with a further fine, which may extend to Rs. 200 for every day, during which the breach continues after the conviction for the first breach. It clearly means that if a breach, which is a continuing one, continues after conviction has been recorded for the first breach, a fresh offence has been created by this amendment and it has been made punishable as shown therein. The real crux of the question is whether the breach in question is a continuing one. It will be significant to note that a continuing breach is only made further punishable by this amending Act. If a breach is not a continuing one and for such a breach, conviction has been already recorded, a person for the same breach cannot be again tried and convicted. If that is sought to be done, that person can invoke the provisions of S. 403 of the Criminal Procedure Code successfully. It will be significant to note that in the instant case, there is no question of this amending Act to be given retrospective effect. Penal provisions cannot be given a retrospective operation. The learned Government Pleader has fairly conceded that position. He urged that the present offence is said, by the prosecution, to have been committed after this amending Act came into operation and that too, after the conviction for the first breach was recorded on 30 March, 1966. He, therefore, urged that even though this amending Act has got a prospective operation, the offence in question, being made punishable, it being a fresh offence; the accused-opponents, can be prosecuted, tried and convicted.

9. In the case of *State of Gujarat v. J. L. Vakharia* [1964 II L.L.J 206], Raju, J., at p. 207, has made the following observations, which can be referred to, with advantage at this stage :

"The expression "commission of the offence" may refer to positive acts as well as omissions. An offence may be committed by the commission of a positive act or by the omission to do an act. In the case of certain acts, the commission of the act would be complete as soon as the act is committed and the offence would be repeated only if the act is repeated. But there may be some positive acts, which by their definition imply the continuous commission of the act. For instance, the offence of kidnapping is defined as taking or enticing a minor out of the keeping of the lawful guardian of the minor, etc. The taking out of the lawful guardianship is an act which continues after the act is once commenced and which continues until it is terminated by another positive act. In a sense there is nothing like a completion of the act unless the minor is restored to the lawful guardian. Such a positive act does not terminate unless the person commits another positive act of restoring the minor to the lawful guardian. But omission to do a positive continuous act may be made criminal. Here again the omission once begun does not terminate until a positive act is done. For instance, if the omission to provide food is an offence, that omission continues unless and until food is provided. But the omission to do a single positive act which is not continuous may not be a continuing offence."

10. In the instant case, in view of the award of the Supreme Court, the accused-opponents had to perform a positive act of paying the bonus of the year 1957-58, and arrears of wages to their workers on 17 February and 17 March, 1965, respectively. Omission to do that positive act, which will continue till the payment is made, could be made the subject-matter of a criminal offence. In the instant case, prior to the amendment, a breach of such a term of award only was made punishable. It could not be gainsaid that this breach will continue till the amounts contemplated in this award of the Supreme Court are paid to the workers. It, therefore, means that the breach is of such a nature that it continues till the positive act is done by the accused-opponents by paying those amounts. Prior to this amendment, a breach committed was made punishable. Continuance of that breach was not made punishable. By this Act 35 of 1965, such a continuance of breach is also made punishable. It means that a fresh offence is sought to be made out by this amendment. If a person continues a breach, he commits a fresh offence, as continuance of a breach is made punishable by this amending Act. If the accused-opponents were being tried for the continuance of breach, prior to 19 November, 1965, they could have very well urged that this amending Act contains a penal provision and as this new offence was created by it, it cannot be given a retrospective operation. The conviction for the first breach was recorded on 30 March, 1966. The amending Act had come into force on 19 November, 1965. The accused-opponents, therefore, were in the know of the legal position that the continuance of any breach, which would be after 30 March, 1966, is made punishable at law.

In pp. 207-208 of the aforesaid judgment, Raju, J., has further observed as under :

"It makes no difference to these principles that a prescribed act has to be done within a specified period. The positive act of providing a canteen has got to be done within six months of a particular notification, but the omission to do so does not become complete, as soon as the six months" period is over. The establishment of a factory without a licence may be an offence. Similarly, working a factory without a licence may be an offence. Both of those are positive acts, but the establishment of a factory is complete as soon as the factory is established. The offence of working a factory without a licence continues so long as the factory continues to work. It is this principle, which has been explained in *Emperor Vs. Karsandas Govindji Ved*, ; and *Mulla Haji Yusufali and Another Vs. Pandit Laxminarayan*, , relied on by the learned counsel for the State. I agree with the following observations in *State Vs. A.H. Bhiwandiwalla*, :

"If the offence committed was one which could be committed only once, then that offence was not a continuing offence and the provisions of limitation under S. 106 of the Act would apply to it, but if the offence committed was of such a character that it was committed by the respondent from day to day, then it was a continuing offence to which the provisions of limitation did not apply."

A distinction has to be made between an omission to do a single act which is prescribed and an omission to do an act when what is prescribed is a continuous act such as the provision of a canteen."

11. Bearing in mind the test laid down in this decision, with which I am in respectful agreement, the present case is a case where the breach continues till the amounts mentioned in the award are paid to the workers. The breach is not completed when the payment is not made on 17 February and 17 March, 1965, respectively. It is the duty of the accused-opponents to pay the bonus amounts and the arrears of wages to their workers. As per the settlement, they were required to pay these amounts on 17 February and 17 March, 1965. As they did not pay those amounts accordingly, they came to be prosecuted and came to be convicted for the first breach. If they omit to do a positive act, of paying those amounts, it could be without any doubt, said that the breach is continued and that breach will and only when they do a positive act of making those payments to the workers. Till then, that breach continues. It means that a fresh offence is being committed by them for continuing that breach and such continuance of a breach has been made punishable by the aforesaid amending Act. If such a breach is, therefore, continued after that amending Act came into force, and it is continued after the conviction was recorded for the first breach, it could be said that the accused-opponents would be committing an offence which has been created by this amending Act. The argument of the learned advocate Sri Desai, that as such a continuance of a breach was not made punishable at the time, the first breach was committed, the accused-opponents cannot be tried for the offence created under this amending Act, is in my opinion, not well-founded. By

making such a provision, the legislature does not in effect give any retrospective operation to these provisions, introduced by this amending Act. The act of the accused, which is sought to be punished, is not a breach they committed by not making payments up to 17 February and 17 March, 1965, respectively. The act of theirs which is sought to be penalized, is, an act of continuing the omission to pay that amount after this amending Act came into force and that too, after they were convicted for the first breach.

12. A Full Bench of the Patna High Court, in the case of *The State Vs. Kunja Behari Chandra and Others*, has explained the meaning of the words "continuing offence" as under :

"The expression "continuing offence" means that if an act or omission on the part of an accused constitutes an offence, and if that act or omission continues from day to day, then a fresh offence is committed on every day on which the act or omission continues."

13. In a case like the present case, an omission continues from day to day, as the amounts required to be paid by the accused-opponents to their workers in view of the Supreme Court's award, have not been paid. It has not been paid even after the accused-opponents were convicted for the first breach. It could not, therefore, be gainsaid that the breach in question is a continuing breach and on account of that continuance of breach, a fresh offence will be committed on every day on which the omission continues.

14. The learned advocate, Sri Desai, appearing on behalf of the accused-opponents, invited my attention to the decision of a Division Bench of the Bombay High Court in the case *In re Dosabhai Ardeshir Cooper* [52 Bom. L.R. 625], Gajendragadkar, J., as he then was, speaking for the Revision Bench, observes that :

"Section 516AA of the Code of Criminal Procedure, 1898, added by Bombay Act 46 of 1948, is not retrospective in its operation. Hence, costs cannot be awarded in a case filed before the section came into force, even if the prosecution is without reasonable and probable cause."

15. It is significant to note that the complaint was filed on 21 March, 1948. Section 516AA was added to the Criminal Procedure Code on 22 May, 1948. Under the unamended Code of Criminal Procedure, there was no power vested in the Court to award costs. The only power which was conferred upon the criminal Courts was to make an order as to compensation under S. 250 of the Criminal Procedure Code. That was, however, available in cases where it was found that the complaint was false, frivolous or vexatious; and it could be exercised by those Courts alone that are mentioned in S. 250. By the introduction of S. 516AA, if the Court finds that the complaint was made or the information was given without any reasonable and probable cause, it may, at the time, the accused is ordered to be discharged or acquitted, at the time of making such order, if the complainant or informant is present, call upon him forthwith to show

cause why he should not be ordered to pay costs to such person; or if the complainant or informant is not present, direct the issue of a notice to him to appear and show cause as aforesaid. A perusal of that section indicates that the order contemplated therein is to be passed at the time the accused is being discharged or acquitted, if the Court finds that the complaint was filed without reasonable and probable cause. If the complainant is absent at that time, notice has got to be issued to him show cause, why such an order should not be passed.

At p. 626, it has been observed in the body of the judgment by Gajendragadkar, J., as under :

"This means that the provision made by S. 516AA that costs could be awarded against a complainant if it is shown that the complaint was filed without any reasonable and probable cause imposes upon the complainant a new liability altogether and in our opinion this is a very material circumstance in deciding whether such a new liability could be retrospectively enforced. It is a well-settled rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication. On the other hand, statutes dealing merely with procedural matters apply to proceedings pending at the time when the statutes are passed. In this sense a clause newly enacted in any procedural law would normally be treated as retrospective on the ground that it affects merely procedure and change of procedure cannot be said to affect any vested rights. It may also be conceded that costs are usually a matter of discretion and a party cannot be said to have any vested right in respect of an order as to costs. But in the present case, S. 516AA really imposes a new obligation upon a complainant if his complaint is found to have been filed without a reasonable and probable cause and in that sense the new section cannot be regarded as being merely procedural. It undoubtedly imposes a new liability, and if that is so, it could not be treated as retrospective on the ground that it is a part of the procedural law. It seems to us that there can be no doubt that statutes which affect vested rights or create new obligations would not normally be taken to be retrospective unless they use clear words to show that intention. We, therefore, think that S. 516AA is not retrospective in operation. It is obvious that the complaint in the present case was filed before the new section was enacted and so we must hold that the learned Magistrate had no jurisdiction to pass the order under the said section."

16. I am in respectful agreement with the principles enunciated in the aforesaid decision. In that case, a complaint was filed before S. 516AA was added to the Criminal Procedure Code. Section 516AA empowered the Court to award costs if the complaint was filed without a reasonable and probable cause. The complaint having been filed earlier, the provisions of S. 516AA could not be pressed into service, unless the Court holds that it has got a retrospective operation. In the instant case, that is not the position. By the amendment in question, a continuance of a breach is also made punishable at law. The breach continued after this amended Act came into force. It means that the act is committed by

the accused-opponent after the amending Act came into force, which created a new offence, meaning thereby that it provided punishment for continuing a breach; such act is made penal by it and hence the penalty will be imposed as provided by the amending Act. He is not being saddled with any new liability for the act which he committed prior to the coming into force of this amending Act. As stated earlier, the ingredients of the offence in question would not be the same as those of the offence committed on account of a breach committed for the first time for which the accused-opponents were tried and convicted. In the instant case, the prosecution will have to prove that the accused-opponents had committed a breach of the terms of the award for which they were tried and convicted. They will have further to prove that after that order of conviction was recorded, they have continued that breach. It is, therefore, evident that the ingredients of the offence in question are not the same as those of the offence for which the accused-opponents were convicted and sentenced.

17. Section 403(1) of the Criminal Procedure Code on which also reliance has been placed by the learned Additional Sessions Judge, cannot be pressed into service. It runs as under :

"A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under S. 236, or for which he might have been convicted under S. 237."

18. The present offence cannot be said to be the same offence. It could not be said that the accused-opponents are being tried again for the same offence or on the same facts for any other offence for which a different charge from the one made against them, might have been made under S. 236 or for which they might have been convicted under S. 237 of the Criminal Procedure Code. For a prosecution like the present prosecution, it has got to be proved that a breach of any of the terms of the award was committed by the accused-opponents and they were prosecuted and convicted for such first breach. It, therefore, means that unless such conviction is recorded for the first breach, they could not have been charged for the continuance of the breach in the first prosecution. It is only after such conviction is recorded and a breach is continued thereafter, they could be prosecuted for an offence like the present offence. I, therefore, hold that the provisions of S. 403 of the Criminal Procedure Code also cannot be pressed into service.

19. The learned Additional Sessions Judge has; in the course of his judgment, observed as under :

"Under the old S. 29 the applicants could be convicted only once. That offence was not a continuing one. The amending provision of S. 29 by India Act 35 of 1965 was creating a new obligation on the petitioners and was taking away a

vested right of the petitioners of being convicted only once."

20. I fail to understand as to what is meant by a vested right of the petitioners of being convicted only once. Probably, these observations have been made, keeping in mind a question whether the amending Act has got a retrospective operation or a prospective operation. It has been observed therein further as under :

"The present prosecution was undoubtedly in respect of breaches committed by the petitioners on 17 February and 17 March, 1965 by not complying with the terms of the settlement arrived at before the Supreme Court in regard to the payment of bonus, and arrears of wages and dearness allowance to the workmen for the year 1957-58. It is easy to see that the amended S. 29 enlarged the obligation of the petitioners and was imp tring their vested right, which was acquired by them under the then existing S. 29 of the Industrial Disputes Act of being convicted only once for breach of the terms of settlement committed by them prior to 19 November, 1965. The legislature ought to be presumed to indicate what was just. On the strength of the said presumption, it was not possible to held that the instant amendment was intended to have retrospective operation. The present prosecution was clearly imposing a new liability on the petitioners for their breach committed by them on 17 February and 17 March, 1965, and hence, they could not be convicted under the amended provision of S. 29 of the Act."

21. With respect to the learned Additional Sessions Judge, I may say that his approach to the problem was erroneous as there is really no question of giving retrospective effect to the amending Act. The amending Act is not being given a retrospective operation. It is not that the act of the accused-opponents of not making payments on the due dates, namely. 17 February and 17 March, 1965, respectively, is sought to be visited with a penalty by the prosecution. It is the act of the accused-opponents of not making payments after the conviction was recorded for the first breach on 30 March, 1966, i.e., the act of their omitting to make payments which they are required to do as per the award of the Supreme Court and that too, after the order of conviction was recorded for the first breach, that is sought to be visited with a penalty. I, therefore, hold that the order passed by the learned Judicial Magistrate, First Class, Narol, was quite proper and legal. The reference made by the learned Additional Sessions Judge, therefore, cannot be accepted.

22. The reference is rejected. Rule is discharged.