

(2007) 04 GUJ CK 0023

In the Gujarat High Court

Case No : Special Criminal Application No. 537 of 1994

Chandrasinh Jaisinh Mahida

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 02-04-2007

Acts Referred:

Companies Act, 1956 — Section 630, 630(1), 630(2)

Criminal Procedure Code, 1973 (CrPC) — Section 257, 300, 468(2), 472, 630

Citation : (2008) 146 CompCas 69

Hon'ble Judges : H.N. Devani, J

Bench : Single Bench

Advocate : D.D. Vyas, for the Appellant; A.Y. Kogje, Assistant Public Prosecutor for Respondent No. 1 and Nilesh Shah, for D.T. Shah, for the Respondent

Final Decision : Allowed

Judgement

H.N. Devani, J.—The facts of the case stated briefly are that the complainant Reliance Machine Manufacturers P. Ltd., is a company registered under the Companies Act, 1956 ("the Act"). The petitioner herein (original accused) was employed as a welder in the said company. During the course of his employment the petitioner had been given a quarter being C-5/65 in the G.I.D.C., Umergaon area, for residential purpose which was required to be handed back upon his service coming to an end. The petitioner services came to be terminated on April 13, 1984, whereupon he was asked to hand over the possession of the said premises. However, he continued his possession. From time to time request was made to hand over possession, however he had illegally continued his possession. By an award dated June 27, 1988, the labour court upheld the termination of the petitioner's service as legal and valid. The continuation of possession of the premises from April 13, 1984, being an offence punishable u/s 630(1) of the Act, a complaint came to be lodged against the petitioner u/s 630(1) and (2) of the Act before the learned Judicial Magistrate First Class, Umergaon, being Criminal Case No. 2342 of 1988. It appears that the petitioner has filed a civil suit being Regular Civil Suit No. 40 of 1985 before the court of

competent jurisdiction at Umergaon, claiming to be a tenant of the said premises. However, the said civil suit came to be dismissed, against which the petitioner preferred an appeal which was pending before the District Court.

2. By a judgment and order dated May 7, 1991, the learned Judicial Magistrate held that the petitioner was guilty of the offence punishable u/s 630(1) of the Act and accordingly sentenced him to pay a fine of Rs. 500 and in default to undergo simple imprisonment for 20 days. The learned Judicial Magistrate in exercise of powers u/s 630(2) of the Act also directed the petitioner to hand over possession of the premises in question to respondent No. 2 within a period of 45 days from the date of the order, that is, on or before June 15, 1991 and in default to undergo simple imprisonment for a period of 3 months.

3. Being aggrieved, the petitioner carried the matter in appeal before the learned sessions judge, Valsad at Navsari being Criminal Appeal No. 11 of 1991. By a judgment and order dated March 17, 1994, the learned sessions judge dismissed the appeal, which has given rise to the present petition.

4. Heard Mr. Deep Vyas, learned advocate for the petitioner, Mr. A.Y. Kogje, learned additional public prosecutor for respondent No. 1 - State of Gujarat and Mr. Nilesh Shah, learned advocate for Mrs. D.T. Shah, learned advocate for respondent No. 2.

5. The learned advocate for the petitioner had drawn the attention of the court to the contents of paragraph No. 4 of the impugned judgment and order of the learned Additional Sessions Judge, to point out that, initially, a complaint for the same offence had been lodged in the Umergaon court on November 30, 1988, which was registered as Criminal Miscellaneous Application No. 33 of 1988. In the said case, notice had been issued against the petitioner/accused, however, subsequently the complainant had withdrawn the complaint and accordingly, the trial court had acquitted the petitioner. It was submitted that upon the same facts and with respect to the same offence the petitioner was tried earlier by the learned Judicial Magistrate First Class, Umergaon and acquitted thereof. He could, therefore, not have been tried once again in respect of that offence and consequently his conviction and sentence are illegal. It was submitted that as the petitioner had been acquitted of the said offence, a second complaint qua the same offence was barred u/s 300 of the Code of Criminal Procedure, 1973 ("the Code"). Reliance was placed upon a decision of the Kerala High Court in the case of Eciyo Coconut Oils Pvt. Ltd. Vs. State of Kerala, as well as a decision of this court in the case of Nandlal Dahyalal Shah and Others Vs. Lalchand Motichandbhai and Another,

6. It was further contended that the present complaint has been filed by respondent No. 2, whereas the property in question belongs to one Roshan Industries P. Ltd., which is a sister concern of respondent No. 2, hence, the provisions of Section 630 of the Act will not be attracted. It was also pointed out that, it was only after the decision of the trial court in civil proceedings against

which an appeal was preferred by the petitioner which was pending before the appellate court, that the present complaint which is the second complaint qua the same offence came to be filed. It was submitted that parallel proceedings, both civil and criminal, would not be maintainable. It was argued that the reasoning adopted by the learned Additional Sessions Judge while accepting the contention of the petitioners that the second complaint is not maintainable, but holding that the offence is a continuous offence and hence, the complaint is maintainable for the subsequent period, is erroneous and not in consonance with the provisions of law.

7. On the other hand, Mr. A.Y. Kogje, learned additional public prosecutor for respondent No. 1 - State of Gujarat supported the impugned judgments and orders. It was submitted that, under the provisions of Section 300 of the Code, a person once convicted or acquitted cannot be tried for the same offence. However, the explanation to the said Section provides that the dismissal of a complainant, or the discharge of the accused, is not an acquittal for the purposes of this section. It was accordingly, submitted that the withdrawal of the complaint cannot be equated with acquittal and as such, the provisions of Section 300 of the Code cannot be attracted. Reliance was placed upon a decision of the Supreme Court in the case of Jatinder Singh Vs. Ranjit Kaur, It was accordingly, submitted that no fault can be found with the reasoning adopted by the learned Additional Sessions Judge.

8. Mr. Nilesh Shah, learned advocate for respondent No. 2 has submitted that, unless and until a complete trial has been conducted and the accused has been acquitted on merits, it cannot be said to be an acquittal, hence, the present complaint u/s 630 of the Code is maintainable. It was further submitted that the contention as regards the provisions of Section 300 of the Code being applicable to the facts of the present case, was not raised before the learned Judicial Magistrate and was taken up for the first time before the learned Additional Sessions Judge, hence, the petitioner was barred from raising such a contention subsequently. Reliance was placed upon the decision of the apex court in the case of Mohammad Safi Vs. The State of West Bengal, , wherein it has been held that, where a court says, though erroneously, that it was not competent to take cognizance of the offence, it has no power to acquit that person of the offence. An order of acquittal made by it is in fact a nullity. It was accordingly, submitted that the impugned judgment and order passed by learned Judicial Magistrate First Class as well as the learned Additional Sessions Judge are just, legal and proper, and do not call for any intervention in the hands of this court.

9. In the background of the facts noted hereinabove, the main issue that arises for consideration before this court is as to whether a complaint, which was once lodged before a court of competent jurisdiction and has been subsequently withdrawn after issuance of notice, can be said to result into an acquittal so as to attract the provisions of Section 300 of the Code. The second issue that arises for consideration is as to whether an offence u/s 630 of the Act can be said to be a

continuing offence so as to enable the concerned company to file a second complaint in respect of the same offence under the said provision.

10. From the facts emerging from the record of the case, it appears that initially a complaint was lodged against the petitioner in the court, at Umergaon, on November 30, 1988, being Criminal Miscellaneous Application No. 33 of 1988, alleging commission of the offence punishable u/s 630(1) and (2) of the Act. Pursuant to the said complaint, the learned Judicial Magistrate directed issuance of process against the petitioner, however, on December 5, 1988, the complainant withdrew the complaint. Subsequently, another complaint, i.e., the present complaint came to be lodged by respondent No. 2 against the petitioner on December 8, 1988, in the court of the Judicial Magistrate First Class, Umergaon for the offence punishable u/s 630(1) and (2) of the Act. By the impugned judgment and order dated May 5, 1991, the learned Judicial Magistrate First Class, Umergaon, convicted the petitioner, as noted hereinabove. In appeal before the learned Additional Sessions Judge, it was contended on behalf of the petitioner that, in view of the withdrawal of the complaint lodged vide Criminal Miscellaneous Application No. 33 of 1988, the petitioner was deemed to have been acquitted. Hence, in view of the provisions of Section 300 of the Code, the petitioner could not be tried for the same offence for a second time.

11. The learned Additional Sessions Judge has observed that, in view of the fact that the complainant had withdrawn the earlier Miscellaneous Criminal Application No. 33 of 1988 u/s 257 of the Code, it would mean that by virtue of the said order, the court has held that the offence is not proved against the accused and has acquitted him. Hence, till the said order is in force, a second complaint cannot be lodged against the accused u/s 300 of the Code. However, the learned Additional Sessions Judge has come to the conclusion that the alleged offence could be said to have commenced from April 13, 1984, and was a continuous offence, and that the order passed in Criminal Miscellaneous Application No. 33 of 1988, whereby the accused had been acquitted can be considered to be in respect of the unlawful act up to the date of the said order, i.e., November 30, 1988. However, even after November 30, 1988, the unlawful act of the accused has continued. Therefore, in the opinion of the learned Additional Sessions Judge, the provisions of Section 300 of the Code would not be attracted qua the period subsequent to November 30, 1988.

12. In the background of the facts stated hereinabove, it would be necessary to examine the legal position in this regard. This court in the case of Nandlal Dahyalal Shah and Others Vs. Lalchand Motichandbhai and Another, has held thus:

The learned Magistrate after having applied his mind had found that there is some factual basis for the allegations made in the complaint and there is prima facie case for the accused to answer, he has issued process. If there is no substance in the matter he would not have issued process at all, but issuance of process shows that the earliest stage to trial has commenced. It is an important

question as to at what stage of the proceedings can a trial be said to begin. Obviously, when the court is moved by a party and the court applies its mind and gives an order or direction to issue process, the first step in the legal process can be said to have commenced which would be the beginning of the trial.

5. Once a trial begins it must end in acquittal or conviction. When an accused person is held to be acquitted, it cannot be said that there was no trial, because it would be a contradiction in terms and cannot be said that a person was acquitted without trial. Therefore, the acquittal at whatever stage and for whatever reason is an acquittal after the trial. Even at the early stages of trial, once a trial has commenced, it is nonetheless a trial. It cannot be said that it is not a trial until a matter is fully heard on merits and decided after recording evidence. Therefore, it appears that the person can be said to be tried for the purpose of Section 300 of the Criminal Procedure Code once the trial has commenced.

13. The Kerala High Court has, in the case of Eciyo Coconut Oils Pvt. Ltd. Vs. State of Kerala, held as follows:

Explanation to Section 300, Criminal Procedure Code says that the dismissal of a complaint or the discharge of the accused is not an acquittal for the purpose of the section. In the Explanation, the acquittal of an accused on allowing withdrawal of a complaint is not made mention of and it is not stated that such an acquittal cannot be treated as an acquittal for the purpose of the section. That also would indicate that the acquittal of an accused on allowing withdrawal of complaint will be an acquittal as mentioned in Section 300, Criminal Procedure Code.

14. Applying the principles laid down in the aforesaid decisions to the facts of the present case, it is an undisputed position that initially a complaint being Miscellaneous Criminal Application No. 33 of 1988 had been lodged against the petitioner, wherein the learned Judicial Magistrate had directed to issue process. Subsequently, respondent No. 2 - complainant withdrew the said complaint on December 5, 1988, u/s 257 of the Code, hence, the same would amount to an acquittal as envisaged u/s 300 of the Code. The subsequent complaint was lodged on the ground that the offence on the part of the petitioner commenced from April 13, 1984, and was a continuous offence on and from June 27, 1988.

15. The apex court in the case of Gokak Patel Volkart Ltd. Vs. Dundayya Gurushiddaiah Hiremath and Others, has held that refusal to vacate the company quarter after retirement or termination of service constitutes a continuing offence within the meaning of Section 472 of the Criminal Procedure Code and hence, the period of limitation u/s 468(2)(a) of the Criminal Procedure Code for taking cognizance of the offence would be inapplicable.

16. Though refusal to vacate the company quarter constitutes a continuing offence, the same would be a relevant consideration while taking into account any objection raised regarding the period of limitation in filing the complaint.

However, once on the same set of facts an accused has been acquitted, whether it is permissible to prosecute him on the ground that the offence is a continuous one is the question which arises for consideration. This court in the case of Nandlal Dahyalal Shah and Others Vs. Lalchand Motichandbhai and Another, has held that once process is issued, trial begins. When an accused person is held to be acquitted, it cannot be said that there was no trial, because it would be a contradiction in terms and cannot be said that a person was acquitted without trial.

17. Therefore, the acquittal at whatever stage and for whatever reason is an acquittal after the trial. Turning to the facts of the present case, once the petitioner has been acquitted of the offence u/s 630 of the Companies Act after trial, another trial on the same set of facts and for the same offence, albeit for a different period would still be barred by the provisions of Section 300 of the Code. Besides, in the present case, it is not as if the complaint has been lodged for a different period subsequent to the date of the order passed in the first case. The complaint is for the period right from the date of the alleged withholding of the company property. It is the learned Sessions Judge who has bifurcated the offence into two periods, one prior to the date of the order and another subsequent thereto, to come to the conclusion that in view of the earlier acquittal, the bar of Section 300 would be operative insofar as the period prior to the date of the order is concerned but would not be operative insofar as the subsequent period is concerned, as the offence in question is a continuing one. The fact that the offence is a continuing one would come to the aid of respondent No. 2 for the purpose of overcoming the bar of limitation u/s 468(2)(a) of the Criminal Procedure Code, but the same cannot come to the aid of the said respondent while considering the bar u/s 300 of the Code inasmuch as when on the same set of facts and for the same offence, the accused has already been acquitted after trial, he cannot be tried again for the same offence for a subsequent period.

18. The decision in the case of Mohammad Safi Vs. The State of West Bengal, , has no application to the facts of the present case, as this is not a case where the court lacks jurisdiction to decide the case or that the court had held that it had no jurisdiction to decide the case. The decision of the Supreme Court in the case of Jatinder Singh Vs. Ranjit Kaur, also does not lend any support to the case of the respondent as this is not a case where the first complaint has been dismissed for default. In the present case, the learned Magistrate had taken cognizance pursuant to the first complaint and directed to issue process. Thereafter, the complainant sought permission to withdraw the complaint pursuant to which, the learned Magistrate permitted him to withdraw the complaint and thus acquitted the petitioner-accused of the offence.

19. For the foregoing reasons, the impugned order dated March 17, 1994, passed by the learned Additional Sessions Judge, Valsad, at Navsari, passed in Criminal Appeal No. 11 of 1991, in so far as it holds that, as the offence u/s 630

of the Companies Act, 1956, is a continuous offence, for the period subsequent to November 30, 1988, i.e., the date of the earlier order acquitting the petitioner would not attract the provisions of Section 300 of the Code, cannot be sustained and is required to be quashed to that extent.

20. In the result, the petition succeeds and is, accordingly, allowed. The impugned order dated March 17, 1994, rendered in Criminal Appeal No. 11 of 1991, by the learned Additional Sessions Judge, Valsad, at Navsari, to the extent it holds that the complaint for the period till the date of the order of acquittal in the earlier criminal application is barred in view of the provisions of Section 300 of the Code is hereby confirmed. However, to the extent the learned Sessions Judge holds that for the period subsequent to November 30, 1988, the provisions of Section 300 of the Code would not be attracted, is hereby quashed. Rule is made absolute accordingly.