

(2007) 06 GUJ CK 0024

In the Gujarat High Court

Case No : Spl. Cri. Application No's. 1261 and 1716 to 1718 of 2005 and
Miscellaneous Cri. Application No's. 3804, 3814 and 3818 of 2007

Kershi Pirozsha Bhagvagar

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 21-06-2007

Acts Referred:

Bombay Reorganisation Act, 1960 — Section 87
Criminal Procedure Code, 1973 (CrPC) — Section 200, 218, 219, 220, 221
Forward Contracts (Regulation) Act, 1952 — Section 22A, 22B
Negotiable Instruments Act, 1881 (NI) — Section 138
Penal Code, 1860 (IPC) — Section 302, 379, 380, 409, 420

Citation : (2007) CriLJ 3958 : (2007) 3 GLR 2508 : (2008) 3 RCR(Criminal) 477

Hon'ble Judges : J.M. Panchal, J;Abhilasha Kumari, J

Bench : Division Bench

Advocate : Kruti M. Shah, Premal R. Joshi and V.H. Nangesh, for the Appellant;
Archana Raval, Addl. P.P., Manish R. Raval and Archana Acharya, for the
Respondent

Final Decision : Dismissed

Judgement

Abhilasha Kumari, J.—Rule is issued in Special Criminal Application No. 1261 of 2005. Ms. Archana C. Raval, learned APP waives service of notice on behalf of respondent No. 1. Mr. Manish R. Raval, learned Counsel, waives service of notice on behalf of respondent No. 2. In Special Criminal Application Nos. 1716 to 1718 of 2005, rule was issued on 13-2-2007 and the respondents are duly served.

2. The above numbered petitions have been placed before this Court pursuant to the order dated 27-12-2006 passed by learned single Judge of this Court in Special Criminal Application No. 1261 of 2007, which reads as under:

1.0 Ms. Shah, learned Advocate for the petitioner, in support of her case, has placed reliance on following decisions,

(A) "Satishkumar Jayantilal Shah v. State of Gujarat" reported in 1999 DCR 329,

(B) "K.P. Devassy v. The Official Liquidator" reported in 1999 DCR 339.

2.0 Having gone through the aforesaid decisions, it appears that the view taken by the respective learned single Judges are contrary. I am, therefore of the opinion that the matter requires to be placed before the Division Bench.

3.0 Office, therefore, is directed to place the matter before the Division Bench, taking up such matters, after taking necessary approval from Hon"ble the Chief Justice K.S. JHAVERI, J.)

3. At the outset it is relevant to notice that no specific question of law has been referred to the Division Bench for clarification and decision. It can, therefore, be safely understood that the entire matter and all the issues raised therein are encompassed in the reference to the Division Bench for its determination and adjudication. We, therefore, propose to decide all the issues raised before us by the learned Counsel for the parties.

4. In order to effectively resolve the issues raised before this Court, it is necessary to notice the facts of Special Criminal Application No. 1261 of 2005. The respondent No. 2 therein has filed two private complainants u/s 138 of the Negotiable Instruments Act, 1881 ("the N.I. Act" for short) in the Court of learned Chief Judicial Magistrate, Surat, which are registered as Criminal Case No. 2215 of 1996 and Criminal Case No. 2905 of 1996 respectively. The case of the complainant in Criminal Case No. 2215 of 1996 is that a loan of Rs. 50,000/- was advanced to the petitioner On 25-12-1995 for which the petitioner had issued a cheque of Rs. 25,000/- dated 30-1-1996 and another cheque of Rs. 25,000/- dated 20-2-1996 drawn on Rander Road Branch of the Bank of Baroda, Surat. Ac-cording to the complainant, the cheque dated 30-1-1996 was tendered for encashment on 26-7-1996. However, it bounced on 31 -7-1996 with an endorsement that "Exceeds Arrangement". The second cheque dated 20-2-1996 was tendered for encashment on 7-8-1996, which also bounced on 9-8-1996 with the same endorsement made by the Bank. Therefore, two separate notices dated 12-8-1996 were issued by R.P.A.D. and UPC on the petitioner. Since the petitioner did not reply to the notices or tender the amount due, the above referred to complaint is filed u/s 138 of the N.I. Act.

5. As far as Criminal Case No. 2905 of 1996 is concerned, it is the case of the complainant that a loan of Rs. 65,000/- was advanced by him to the petitioner on 7-12-1995. The petitioner issued cheque dated 10-3-1996 for an amount of Rs. 35,000/- which was tendered for encashment on 6-9-1996. However, the same bounced on 7-9-1996 with the endorsement of the Bank "Payment stopped by drawer". The second cheque dated 30-1 -1996 for an amount of Rs. 30,000/-- was presented in the Bank for encashment on 6-9-1996, but also bounced on 7-9-1996 with the same endorsement by the Bank. The complainant, therefore, issued notice on 14-9-1996. The petitioner replied to the notice on 30-9-1996 but since no payment of the amount due was made, the above referred to complaint is filed u/s 138 of the N.I. Act. On presentation of the complaints, the

learned Magistrate recorded verification of the complainant as required u/s 200 of the Code of Criminal Procedure, 1973. ("the Code for short) and issued process.

6. On service of process, the petitioner filed an application u/s 219 of the Code in Criminal Case No. 2215 of 1996 on 3-8-2002 before the learned 4th Joint Civil Judge (J.D.) and J.M.F.C., Surat, at Exh. 13. A similar application at Exh. 20 was filed in Criminal Case No. 2905 of 1996 on 3-8-2002. In both these applications, the petitioner stated inter alia that as he is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, he should be charged with and tried at one trial because the number of the offences do not exceed three. Both these applications were dismissed by the learned Magistrate by separate orders on 11-8-2004. Being aggrieved by the above mentioned orders, the petitioner preferred Criminal Revision Application No. 235 of 2004 against the order passed below Application Exh. 20, which was filed in Criminal Case No. 2905 of 1996 and Criminal Revision Application No. 257 of 2004 against the order passed below application Exh. 13, which was filed in Criminal Case No. 2215 of 1996, u/s 397 of the Code, before the Sessions Court, Surat on 8- 11-2004 and 24-12-2004 respectively. Both these Revision Applications have been dismissed by separate orders dated 30-7-2005 by the learned Presiding Officer of 11th Fast Track Court, Surat, giving rise to the instant petition i.e. Special Criminal Application No. 1261 of 2005.

7. In Special Criminal Application Nos. 1716 to 1718 of 2005, three complaints were filed in all. As far as, Criminal Case No. 637 of 2002 is concerned, the complainant issued cheque dated 25-1-2002 for Rs. 1,50,000/- to the petitioner, which was presented for encashment on the due date. However, the cheque bounced and the complainant issued notice to the petitioner. Since the amount due was not tendered by the petitioner, the above referred to complaint is filed on 22-2-2002. In Criminal Case No. 2206 of 2002, the cheque dated 31-12-2001 for Rs. 1,00,000/- was issued by the petitioner to the complainant which, when presented before the Bank, bounced. On issuance of notice, when no payment of the due amount was made by the petitioner, the above referred to Criminal Case is filed on 19-6-2002. As far as Criminal Case No. 2346 of 2002 is concerned, cheque dated 31-12-2001 for Rs. 1,00,000/- was issued by the complainant to the petitioner which bounced on presentation to the Bank. On issuance of notice, when no payment of the due amount was forthcoming, the above referred to complaint is filed on 29-6-2002. In all the three criminal cases, the petitioner filed applications u/s 219 of the Code, with the prayer to try all the three cases together. However, the learned Chief Judicial Magistrate, Jamnagar, vide common order dated 25-1-2005 rejected all three applications. Aggrieved by the above order, the petitioner filed three Revision Applications before the Sessions Court, Jamnagar which were registered as Revision Application No. 68 of 2005, Revision Application No. 69 of 2005 and Revision Application No. 70 of 2005. The same were rejected by separate orders dated 14-10-2005 passed by learned Additional Sessions Judge, Fast Track Court No. 3, Jamnagar with a direction to the learned

Chief Judicial Magistrate, Jamnagar to ensure that all three Criminal Cases should be conducted in the same Court and the date of hearing be fixed on the same day. Being aggrieved by the three separate orders of rejection of the Revision Applications filed by the petitioner on 14-10-2005, the petitioner has approached this Court by way of filing Special Criminal Application Nos. 1716 to 1718 of 2005.

8. This Court has heard the learned Counsels for the parties and perused the documents forming part of the petitions.

9. Before dealing with the submissions advanced by the learned Counsels for the parties, it is relevant to mention that there is consensus between the learned Counsels that the matters have been referred to the Division Bench by the learned single Judge in order to decide the question whether the provisions of Section 219 of the Code are applicable to trials under the Negotiable Instruments Act.

10. In this regard, the first submission advanced by Ms. Kruti M. Shah, learned Counsel for the petitioner in Special Criminal Application No. 1261 of 2005 is that the provisions of Section 219 of the Code are applicable to trials under the Negotiable Instruments Act, and it is not correct to contend that the provisions of Section 219 are applicable only to offences defined and punishable under the Indian Penal Code. Ms. Kruti M. Shah has submitted that there is no such bar, either implied or explicit, either in Section 219 of the Code or the N.I. Act and in the absence of any specific provision to the contrary, the applicability of Section 219 of the Code to matters under a special enactment such as N.I. Act, cannot be negated.

11. Mr. Manish R. Raval, learned Counsel for the respondent No. 2 i.e. the original complainant, placing reliance upon observations made in paragraph 5 of decision in Jayeshbhai Jayantibhai Maniar Vs. State of Gujarat, has contended that the provisions of Section 219 of the Code would not be applicable to trials under the Negotiable Instruments Act. He has submitted that since the Negotiable Instruments Act, is a special enactment, it falls as an exception to the scheme envisaged u/s 219 of the Code and, therefore, the provisions of Section 219 of the Code cannot be applied to trials under the Negotiable Instruments Act.

12. Ms. Archana Acharya, learned Counsel for the original complainant in Special Criminal Application Nos. 1716 to 1718 of 2005, has adopted the arguments of Mr. Manish R. Raval and contended that since the Negotiable Instruments Act is a special enactment, the provisions of Section 219 of the Code would not be applicable to the same. However, Ms. Archana C. Raval, learned APP, appearing for the State of Gujarat in all the petitions, has taken a stand that the provisions of Section 219 of the Code would be applicable even to a special enactment such as the Negotiable Instruments Act.

13. Ms. Kruti M. Shah, learned Counsel for the petitioner in Special Criminal Application No. 1261 of 2005 has submitted that reliance placed by the learned Counsel for the complainant on Jayeshbhai Jayantibhai Maniar (supra) is

misplaced since the said judgment, in paragraph 5 thereof, does not lay down such a principle of law that the provisions of Section 219 of the Code are not applicable to trials under the Negotiable Instruments Act.

14. In order to effectively resolve the controversy raised before the Court namely, whether the provisions of Section 219 of the Code are applicable to trials under the Negotiable Instruments Act, it would be relevant to notice certain provisions of the Code. Section 4 of the Code reads as under:

4. Trial of offences under the Indian Penal Code and other laws" (1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

15. Section 219 of the Code reads as under:

219. Three offences of same kind within year may be charged together.-

(1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not, he may be charged with, and tried at one trial for, any number of them not exceeding three.

(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code (45 of 1860) or of any special or local laws;

Provided that, for the purpose of this section, an offence punishable u/s 379 of the Indian Penal Code (45 of 1860) shall be deemed to be an offence of the same kind as an offence punishable u/s 380 of the said Code, and that an offence punishable under any section of the said Code, or of any special or local law, shall be deemed to be an offence of the same kind as an attempt to commit such offence, when such an attempt is an offence.

16. A bare glance at Section 4(2) of the Code makes it more than clear that all offences under any other law have to be investigated, tried and dealt with according to the provisions of the Code unless special provisions are made for investigation, inquiry, trial etc. under any other law. The phrase "any other law" appearing in Section 4(2) of the Code, would encompass within its sweep N.I. Act also. Even Section 219(2) of the Code, while explaining as to what is meant by offences of the same kind, states that offences are of the same kind when they are punishable with the same amount of punishment under the same Section of the IPC or of any special or local laws. Thus, applicability of Section 219 of the Code to inquiry, investigation, trial or offences under a special law is writ large in the said Section. Unless a special law expressly or impliedly provides

that the investigation, inquiry, trial etc. of offences referred to in the special law be different than the one contemplated by the Code, they will have to be investigated, inquired into and tried in the manner provided under the Code. In *State of Gujarat v. Rashish Ahmed Rafik Ahmed* reported in 1991 (1) GLR 548, a Division Bench of this Court has ruled that the procedure prescribed by the Code applies to trials for offences under the Narcotic Drugs and Psychotropic Substances Act, 1985 except where a contrary procedure is prescribed in the 1985 Act. Again in *Mirza Iqbal Hussain through Askari Begum Vs. State of Uttar Pradesh*, the question considered was whether the Court trying an offence; under the Prevention of Corruption Act, 1947 had the power to pass an order of confiscation by reason of the provision contained in Section 452 of the Code. The Supreme Court noticed that the Prevention of Corruption Act was totally silent on the question of confiscation and has held that the provisions of the Code would apply in their full force with the result that the Court trying an offence under the Prevention of Corruption Act would have the power to pass an order of confiscation by reason of the provisions contained in Section 452 of the Code. In *State of Maharashtra Vs. Jayantilal and Others*, , the question considered was whether application of Section 5(2) of the Code was excluded by insertion of Sections 22-A and 22-B in Forward Contracts (Regulation) Act, 1952. After examining the scheme of both the statutes, the Supreme Court ruled that application of Section 5(2) of the Code was not excluded as far as investigation under the Forward Contracts (Regulation) Act 1952 was concerned.

17. The Supreme Court in *Khatri and Others Vs. State of Bihar and Others*, had the occasion to interpret Section 4 of the Code. After referring to the provisions of the said Section in para 3 of the judgment, the following pertinent observations have been made by their Lordships:

It is apparent from this section that the provisions of the Criminal Procedure Code are, applicable where an offence under the Indian Penal Code or under any other law is being investigated, inquired into, tried or otherwise dealt with.

18. There is nothing in the N.I. Act, more particularly in Section 138, which would preclude the procedure envisaged by the provisions of Section 219 of the Code from being adopted in case of any investigation, enquiry or trial under the N.I. Act. In view of the observation made by the Supreme Court and this Court in the above mentioned decisions, the submission of the learned Counsel for the original complainant that the judgment in *Jayeshbhai Jayantibhai Maniar* (supra), as held in para 5 thereof that the provisions of Section 219 of the Code would not be applicable to a special enactment such as the N.I. Act, cannot be accepted. In fact, a careful reading of paragraph 5 of the judgment makes it very clear that in the opening line itself the applicability of provisions of Section 219 of the Code to Section 138 of the N.I. Act is made clear because, it is observed that the proviso should be read closely in view of the scheme of Section 138 of the N.I. Act since there is ample scope of causing prejudice to the petitioner, if all the cases are tried jointly or in a consolidated manner as a single trial. The concept

of prejudice is to be found in proviso to subsection (1) of Section 218 of the Code. Therefore, the next line that the "prosecution u/s 138 of the Negotiable Instruments Act can be said to be a prosecution under a special law and a distinct separate offence, and, therefore, it falls out as an exception of the scheme envisaged u/s 219 of the Code, cannot be taken to be the ratio of the judgment since it only qualifies the sentence preceding it and should be read in its proper context. The contention of the learned Counsel for the original complainant that this sentence lays down a principle of law to the effect that Section 219 of the Code does not apply to matters under the N.I. Act cannot be accepted because, in fact, that question never arose for the consideration of the learned single Judge. On a review of the provisions of Section 4 and Section 219 of the Code as well as Section 138 of the N.I. Act, this Court is of the opinion that the provisions of Section 219 of the Code are applicable to offences investigated, inquired, into, tried and otherwise dealt with in accordance with the provisions of any special enactment such as the N.I. Act. We, therefore, hold that the provisions of Section 219 of the Code are applicable to investigations, inquiries and trials u/s 138 of the N.I. Act.

19. Having held that the provisions of Section 219 of the Code are applicable to trials under the N.I. Act, this Court will now have to examine whether, on the facts and in the circumstances of the case, the provisions of Section 219 of the Code can be invoked by the petitioner. In order to determine this question, the provisions of Section 219 of the Code will have to be scrutinized. Section 218 to Section 224 occur in Chapter XVII-B titled as "Joinder of Charges". All sections deal with the same subject but contemplate different situations for their applicability and set out different aspects of the same subject-matter i.e. "Joinder of Charges". Section 219 of the Code contemplates the commission of three offences of the same kind within a span of 12 months from the first to the last of such offences, whether in respect of the same person or not which can be tried together at one trial. Sub-section (2) of Section 219 of the Code explains that offences are of the same kind when they are punishable with the same amount of punishment under the same Section of the Indian Penal Code (45 of 1860) or of any special or local laws. What is material is that Section 219 of the Code speaks of "offences" and not "transactions" or "acts". Section 219 of the Code deals with offences of the same kind whereas Section 218 deals with separate charges for distinct offences. Section 220 of the Code deals with trial for more than one offence and provides that if, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence. Section 221 of the Code deals with a situation where it is doubtful as to what offence has been committed. Section 222 of the Code deals with a situation when offence proved was included in offence charged. A conjoint reading of Sections 218 to 220 of the Code makes it very clear that three different situations are contemplated by the Legislature in order to make the provisions of these three Sections applicable. Section 218 of the Code clearly

specifies that there shall be a separate charge for every distinct offence and an accused shall be tried separately in respect of every such charge. Section 219 of the Code prescribes the situation in which three offences of the same kind within a year may be charged together, and Section 220 of the Code further prescribes that at one trial, an accused may be tried for more than one offence in one series of acts so connected together to form the same transaction. Sections 219 to 223 contain exceptions to the rule enacted in Section 218 of the Code. Under the proviso to Section 218, jurisdiction has been vested that if such a person is not likely to be prejudiced, then all or any number of charges framed against such a person may be tried together. Under subsection (2) of Section 218 it has been clarified that the Section would not affect the operation of the provisions of Sections 219, 220, 221 and 223.

20. Examining the facts of the present case in the light of the above provisions of the Code, it cannot be denied that in Special Criminal Application No. 1261 of 2005 four different cheques were presented for encashment and all of them bounced, leading to the filing of two complaints. The dishonour of every cheque will give rise to a distinct offence, triable and punishable u/s 138 of the N.I. Act. It cannot be lost sight of the fact that Section 219 of the Code refers to "offences" and not to "transactions" or "acts". Section 219 will be applicable to offences committed in the course of a span of 12 months provided that the offences are of the same kind and do not exceed three in number. The argument of the learned Counsel for the petitioner that all the four cheques which were ultimately dishonoured were in the course of the same transaction cannot, therefore, be accepted since the dishonour of each cheque gives rise to a distinct cause of action and commission of a separate alleged offence.

21. In order to analyse whether dishonour of a cheque constitutes a distinct offence, it would be useful to refer to the provisions of Section 138 of the N.I. Act. Section 138 read as under:

138. Dishonour of cheque for insufficiency, etc. of funds in the account -

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless -

(a) the cheque has been, presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is

earlier,

(b) the payee or the holder in due course of the cheque as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.- For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

22. The essential requirements of Section 138 of the N.I. Act are that (1) there should be a cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person in discharge of any debt or liability, in whole or in part, (2) the cheque should be presented to the banker, (3) it should be dishonoured i.e. returned by the bank unpaid, either because of the amount of money standing to the credit of that account being insufficient to honour them or for the reason that it exceeds the amount arranged to be paid from that account. In case of dishonour, a notice in writing is issued to the drawer of the cheque within a stipulated period and if the drawer of that cheque fails to make the payment of the amount of money within the period stipulated from the receipt of the notice, the drawer of the cheque shall be deemed to have committed an offence punishable u/s 138 of the N.I. Act with imprisonment for a term which may extend to 2 years under the N.I. Act. The ingredients of Section 138 makes it amply clear that every cheque that is dishonoured gives rise to the commission of an alleged offence for which there is a specified punishment. In the instant petition, four cheques were dishonoured, giving rise to four alleged offences. Since Section 219 deals with "offence" and not with "acts" or "transactions", the only conclusion that is possible is that dishonour of four cheques constitutes four distinct offences. The fact that two complaints have been filed in respect of four cheques that have been dishonoured cannot reduce the number of offences alleged to have been committed merely by clubbing two alleged offences in one complaint. The argument that all the four cheques were given as part of same transaction cannot bring the case of the petitioner within the ambit of the provisions of Section 219 of the Code and to do so would be a clear violation of the provisions of that Section.

23. The learned Counsels for the petitioners have placed reliance upon a judgment of the learned single Judge of this Court is Satishkumar Jayantilal Shah v. State of Gujarat reported in 1999 DCR 329. In the case of Satishkumar Jayantilal Shah (supra) the contention raised on behalf of the petitioners was that since four cheques were dishonoured, the Court was not competent to frame

charge against the petitioner for four cheques in view of Section 219 of the Code and that the Court should only have taken cognizance for three cheques and the charge could be framed only with regard to three cheques. The learned Judge of this Court has taken the view that the issuance of these four cheques would be part of same transaction and covered by the provisions of Section 220 of the Code.

24. In view of the discussion regarding the provisions of Section 219 and the conclusions arrived at by this Court, with respect, we are unable to agree with the view expressed by the learned single Judge in *Satishkumar Jayantilal Shah* (supra) which, in our opinion, cannot be considered to be good law.

25. In Special Criminal Application Nos. 1716 to 1718 of 2005, three complaints were filed in respect of the dishonour of three cheques. The prayer made by the petitioners for trial of all the three cases together was rejected by the learned Chief Judicial Magistrate, Jamnagar vide order dated 25-1 -2005 and the Revision Applications filed in all three cases against the order of rejection were also dismissed by separate orders dated 14-10-2005. While dismissing the Revision Applications, the learned Addl. Sessions Judge, Jamnagar has issued directions to ensure that all the three criminal cases should be conducted in the same Court and be fixed for hearing on the same day. Section 219 of the Code confers discretion upon the Magistrate to the effect that if a person is charged with three offences and the same were committed within the space of 12 months, he may be charged and tried at one trial for the said three offences. Whether the discretion conferred by Section 219 is to be exercised and, if so, in which manner, is to be seen by the trial Magistrate in the facts and circumstances of the case. In the instant petitions, the learned Chief Judicial Magistrate has not exercised the discretion conferred by Section 219 in favour of the petitioners and for good reasons. The learned Additional Sessions Judge, Jamnagar vide order dated 14-10-2005 while upholding the order of the learned Chief Judicial Magistrate has directed that all the three criminal cases be conducted in one Court and, for the convenience of parties, the date of hearing of the charges may be kept on the same day. In our considered opinion there is nothing arbitrary or illegal in the orders of the learned Chief Judicial Magistrate and the Revisional Court. As a result of the above discussion, this Court is of the firm view that on the facts and in the circumstances of the case, the orders passed by the learned Chief Judicial Magistrate and by the Revisional Court rejecting the prayer of the petitioner to try the criminal cases together, as contemplated by Section 219 of the Code, suffers from no legal infirmity since the offences alleged to have been committed are more than one and that the provisions of Section 219 are not applicable.

26. This brings us to the second submission made by Ms. Kruti Shah learned Counsel for the petitioner, Which is adopted by Mr. Premal Joshi, learned Counsel for the petitioner in the connected cases that Section 218 and Section 219 should be read together and that the principles laid down in the proviso to Sub-section

(1) of Section 218 should be read into Section 219 of the Code. As a part of the same submission, it is further contended that Section 218 to Section 224 deal with "Joinder of Charges" and should be read together and not in isolation and that the Court should apply the doctrine of harmonious construction while interpreting Sections 218 to Section 224 of the Code. According to the learned Counsels, if such a course is adopted and Section 219 is not read in isolation, then the case of the petitioners falls within the ambit of Section 219 and the prayer for trying the criminal cases together should be granted. In support of this contention, reliance has been placed upon a judgment of the learned single Judge of this Court in Somabhai Shamalbhai Patel and Others Vs. State of Gujarat, wherein the view has been taken that Section 218 to Section 223 of the Code should be read together and that a narrow construction should not be given to the proviso to Section 218 of the Code, which was enacted only after the year 1973. The learned single Judge has further taken the view that the proviso to Section 218 of the Code would be applicable to the whole of Section 218 and not only to subsection (1) of Section 218 and, therefore, the principle laid down in it would also be applicable to Sections 219, 220, 221 and 223 mentioned in subsection(2) of Section 218.

27. Ms. Archana C. Raval, learned APP, has opposed this contention of the learned Counsels for the petitioners and has submitted that a bare reading of Section 218 of the Code would make it clear that this Section deals with separate charges for distinct offences and that the proviso thereto would apply only to Sub-section (1) of Section 218 and not to Sub-section (2) thereof since, in view of the provisions of Sub-section (2), Section 219 and other Sections mentioned in Sub-section (2) will have overriding effect on Section 218. the learned APP has further contended that to read the proviso of Section 218(1) into Sections 219, 220, 221 and 222 of the Code would be nothing short of legislating and adding something into the provisions of law which is not there nor intended to be there by the legislature which is not permissible at all. The learned APP has clarified that a reading of Section 218 and Section 219 of the Code makes it clear that both these sections contemplate different situations although they may be dealing with the same subject i.e. "Joinder of Charges" and as Section 219 is an exception to the general rule propounded in Section 218(1), the provisions of Section 218, including the proviso, cannot be read into Sections 219, 220, 221 and 223.

28. Mr. Manish R. Raval, learned Counsel for the respondent No. 2 in Special Criminal Application No. 1261 of 2005 and Ms. Archana Acharya, learned Counsel for respondent No. 2 in Special Criminal application Nos. 1716 to 1718 of 2005 have supported the arguments of the learned APR Ms. Archana Acharya, learned Counsel for respondent No. 2 in Special Criminal Application Nos. 1716 to 1718 of 2005 has also submitted that the provisions of Section 218, including the proviso, cannot be read into Sections 219 to 222 of the Code since, to do so would result in introducing into those sections certain principles which are not intended to be incorporated therein by the Legislature and that since Sections

218 to Section 223 deals with different situations, the doctrine of harmonious construction cannot be adopted while reading the same and the provisions of one section cannot be read into the other.

29. In order to effectively resolve the controversy whether the provisions of Section 218 and the proviso to Sub-section (1) of Section 218 can be read into Sections 219 to 223 of the Code, it will be useful to advert to a Full Bench judgment of the Bombay High Court rendered by His Lordship Chief Justice Chagla in *D.K. Chandra Vs. The State*, . In that case, the accused was charged with having committed criminal breach of trust in respect of a sum of Rs. 2500/- on 12-4-1949. Alternately, he was also charged with having cheated in respect of the same sum on the very same day. The accused was also charged for having committed criminal breach of trust in respect of a sum of Rs. 900/- and in the alternative he was charge with having cheated in respect of the same sum on the same day. The question that arose for the determination of the Full Bench was whether joinder of these four charges was in accordance with law. After having noticed the material sections regarding the "Joinder of Charges", the Full Bench laid down certain principles of law, which are very pertinent to the facts of the present case and the question in issue before this Court in the present petitions. In that case, an argument similar to the one advanced by the learned Counsel for the petitioners in the present case was advanced before the Full Bench to the effect that even though the accused was faced with four charges, he has really been charged with two offences of the same kind and, therefore, joinder of charges is permissible u/s 234(1) (corresponding to Section 219 of the present Code). Negating this argument, the Full Bench held as under in paragraph Nos. 4 and 5.

4. It is not very helpful to consider whether the exceptions contained in Sections 234, 235 and 236 are mutually exclusive. It would be better to lay down that if the prosecution wishes to justify a trial in which charges are joined, it is for the prosecution strictly to establish that the joinder is permissible under either Sections 234, 235 or 236. It is a well known canon of construction that exceptions must be strictly construed, and unless the prosecution satisfies the Court that the exception has been strictly complied with, the joinder of charges in a trial must be held to be contrary to law. It may be possible in a conceivable case for the prosecution to establish that a case falls under more than one exception. But if it falls under more than one exception it must so fall that it must not infringe the provisions of any of the three sections. It is not permissible for the prosecution to combine and supplement the three sections in such a manner as to contravene the provisions of any of these three sections.

5. Now, applying this test to the facts of the present case, we have here a trial of the accused on four charges and he has been charged with having committed four offences. It is not disputed by the Government Pleader that the transaction of 12th April 1949, and the transaction of 20th April 1949 are separate and distinct. Therefore, it cannot be said that these four offences arise out of the

same transaction. Therefore, it is clear that the joinder of these charges cannot be justified u/s 235(1), Criminal P.C. Is it justified u/s 234(1)? It is not, because the charges contravene Section 234(1) in two respects. In the first place the accused is charged with more than three offences in the second place the offences are not of the same kind. "Offences of the same kind" is defined in Sub-section (2) of Section 234 and the definition is that "offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code or of any special or local law In this case the offences with which the accused is charged are under Sections 409 and 420, Penal Code. Therefore the offences do not satisfy the definition of Section 234(2).

30. The Full Bench went on to clarify that Section 234(1) (corresponding to Section 219 of the present Code) does not deal with acts" but it deals with "offences" and the condition laid down in Section 234(1) is that the accused may be charged with not more than three offences of the same kind and the section does not provide that the accused must be charged with having committed three acts or three series of acts of the same kind. Therefore, although it may be true that the accused is charged with having committed only two acts, in respect of those two acts he was charged with having committed four offences and in charging him, there is a clear contravention of the provisions of Section 234(1).

31. The test laid down by this judgment is that what is to be considered is not what the result of the trial would be and not on what charges will the accused be convicted or sentenced, but, what are the charges which are framed against him and in respect of how many offences he has to face the trial. Applying the test formulated by the Full Bench, the ratio laid down is that the joinder of charges would contravene the provisions of Section 234(1), if it is contended that it falls under that section because the accused was charged for having committed four offences and not two and that if two acts gave rise to four offences, then the accused has to be tried for four offences.

32. It has been laid down in no uncertain terms as under in paragraph 8 of the judgment:

8. Then there is a later decision reported in the same volume of the Bombay Law Reporter. In re B. G. Tilak, 10 Bom LR 973. That is a judgment of Sir Basil Scott C.J. and Batchelor J. that decision arose out of an application made by Bal Gangadhar Tilak for leave to appeal to the Privy Council and the leave was not granted on the ground that no case was made out of miscarriage of justice, Tilak was charged in respect of two articles published in the Kesari on 12-5-1908, and 9-6-1908, and the learned Chief Justice held that the offences charged constituted a series of acts so connected together as to form the same transaction. Therefore, the finding of the Court was that the joinder of charges with regard to these two articles was justified u/s 235(1) as the two articles constituted one transaction. Having held this the learned Chief Justice went on to consider the other question which, with respect, was really not necessary, and that was whether the exceptions mentioned in Section 233 are mutually

exclusive. The learned Chief Justice took the view that these exceptions were not mutually exclusive. With respect, we have no quarrel with this expression if it was intended to be used in the manner we have suggested, but if it was intended to be used in order to convey that although a joinder of charges may contravene one of the sections mentioned in Section 233 it would still be possible to join the charges if it could be shown that the joinder came within the purview of another section mentioned in Section 233 then with respect we are unable to accept that view as a correct view. We do not dispute the correctness of the proposition laid down by the learned Chief Justice that more than one section mentioned in Section 233 can be made use of in cooperation, but the co-operation must not lead to the contravention of any of the sections mentioned in Section 233. The learned Judge further observes (p. 992):

We find it difficult to believe that the Legislature intended that a joint trial of three offences u/s 234 should prevent the prosecution from establishing at the same trial the minor or alternative degrees of criminality involved in the acts complained of. For these reasons, we think that the exceptions are not necessarily exclusive, and that Sections 235(2) and 236 may be resorted to in framing additional charges where the trial is of three Offences of the same kind committed within the year.

With respect, we do not agree with this proposition. What the Legislature intended is clear from the language of Section 234 itself, and that is to confine the joinder of charges under that section to three offences of the same kind. Therefore, in our opinion, that particular case did not really decide the point that we have to consider and the observations of the learned Chief Justice as obiter.

33. The conclusions arrived at in the concurring judgment of His Lordship* Justice Rajadhyaksha (as he then was) are also very pertinent in order to resolve the issue before this Court. The relevant observations are quoted hereinbelow:

18. Rajadhyaksha, J.:— I am in entire agreement with the conclusion arrived at and the reasons therefore given in the judgment which is just delivered by my Lord the Chief Justice. The general rule of procedure is to be found in Section 233, Criminal P.C. The provisions contained in Sections 234, 235 and 236 form an exception to the rule and should therefore be strictly construed. The wholesome rule expressed in Section 233, Criminal P.C. was intended to prevent embarrassment and difficulty to the accused in defending himself in respect to the charges brought against him. The Legislature at the same time recognized that under certain circumstances which the Legislature thought would not cause any embarrassment to the accused, the accused could be tried in respect of more than one offence in the same trial and thus multiplicity of trials could be avoided. These circumstances are mentioned in Sections 234, 235 and 236. We are not concerned with the operation of Section 239 in the present appeal. These sections must, therefore, be construed so as to subserve the principles which the Legislature had in mind when it enacted these sections. To construe these sections as supplementing each other would necessarily result in enlarging the

Scope of each exception. Each section is self-contained and the limits of each have been carefully laid down according to the circumstances contemplated in those sections. To combine those sections must necessarily involve the widening of the scope of each and would result in the destruction of the essential elements of those sections. One can easily imagine the confusion that is likely to follow if we adopted the construction for which the learned Government Pleader has pressed. The prosecution may select three offences of the same kind committed within the space of 12 months against the same person or not, and the accused could be tried on these charges at one trial u/s 234. Then with respect to each transaction in which those offence are committed, the prosecution can add any number of charges for different offences committed in the course of the same transaction - "S. 235(1). If there is any doubt as to which of the several offences the facts which can be proved will constitute, some more cumulative or alternative charges could be added. - Section 236. The Legislature could not possibly have intended that the accused should be faced in one trial with such a bewildering multiplicity of charges. But that result must necessarily follow if we were to accede to the contention of the Government Pleader that the operation of these sections could be combined. Probably no Judge would allow such a combination of charges. But that makes no difference to the principle as to whether the combination of these sections should be permitted so as to destroy the essential principle involved in each section. It is true that in some cases the combination of these sections would cause no prejudice to the accused. I have particularly in mind the situation that would arise by the combination of Section 234 with Section 235(2). If an accused person is charged with the commission of three of offences of theft in the course of 12 months and in one case the theft happens to be of a gun for the possession of which the accused holds no license, I cannot see how the accused would be prejudiced by combining the three charges of theft u/s 234 with a charge under the Arms Act u/s 235(2). But merely because in such a case no prejudice would be caused to the accused, it would be no justification on that score to carve out an exception to the general scheme which is contained in those sections of the Code. I realise that this view might lead to multiplicity of prosecutions which could be avoided - in a few cases without prejudice to the accused, - if we accept the contention of the Government Pleader. But the view we are taking guards against far greater difficulty and much hardship to which an accused person may be subjected if we were to hold that the operation of these sections could be combined in framing charges against him in such a way as to extend the scope of each section.

34. The Full Bench judgment in *D.K. Chandra v. The State* 1952 Cri LJ 779 (supra) is binding upon this Court in view of the Full Bench judgment of this Court in *Anand Municipality Vs. Union of India and Others*, and another judgment of five Hon"ble Judges of this Court in *State of Gujarat Vs. Gordhandas Keshavji Gandhi and Others*, wherein it has been held that in view of Section 87 of the Bombay Reorganisation Act, 1960, the decisions of the High Court of Bombay before the appointed day i.e. first May, 1960 are binding on Gujarat High Court,

as the former Bombay High Court though not a Court of co-ordinate jurisdiction with Gujarat High Court the analogous principles would be applicable to the successor Court of former Bombay High Court, that is to say, to Gujarat High Court.

35. The principles of law laid down in the Full Bench judgment in *D.K. Chandra v. The State* 1952 Cri LJ 779 (supra), were unfortunately, not brought to the notice of the learned single Judge in *Somabhai Shamalbhai Patel v. State of Gujarat* (supra), in which a view contrary to the law laid down in *D. K. Chandra v. The State* (supra) has been taken. The judgment of the Full Bench of Bombay High Court would bind a learned single Judge of this Court and, had the same been brought to his notice, probably the view taken in *Somabhai Shamalbhai Patel v. State of Gujarat* (supra) would not have been taken. In view of the binding nature of the Full Bench judgment of the Bombay High Court, which was not noticed; by the learned single Judge of this Court,; with respect, we hold that the judgment of the learned single Judge in *Somabhai Shamalbhai Patel v. State of Gujarat* (supra), is contrary to the principles laid down by the Full Bench and is, therefore, per in-curiam.

36. A contention has been raised by Ms. Kruti M. Shah, learned Counsel for the petitioner, that the proviso to Section 218 of the Code should be read into (Sections 219 to 223 since the said proviso was inserted only after the year 1973, and the Full Bench had no occasion to deal with the same. A careful reading of para 2 of the Full Bench judgment of the Bombay High Court makes it clear that the principle of prejudice which is incorporated in the proviso to Sub-section (1) of Section 218 was borne in mind while examining and interpreting the relevant provisions of law. Therefore, insertion of the proviso to Sub-section (1) of Section 218 would not militate against the ratio laid down by the Full Bench in *D.K. Chandra v. The State* 1952 Cri LJ 779 (supra). Further, the general rule in construing an enactment containing a proviso is to construe them together without making either of them redundant or otiose. The normal rule is that I it is a very dangerous arid certainly unusual course to import legislation from a proviso wholesale into the body of the statute, as to do so will be to treat it as if it were an independent enacting clause instead of being dependent on the main enactment. Further, to read a proviso as providing something by way of an addendum or as dealing with a subject not covered by the main enactment or as stating a general rule as distinguished from an exception or qualification, is ordinarily foreign to the proper function of a proviso. However, sometime a proviso may be inserted which may be "wholly" or "in part" or in substance a fresh enactment, adding to and not merely excepting something out of, or qualifying the enactment. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term "provided" so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater significance than would be attached to the conjunctive "but" or "and" in the same place, and simply serving to separate or distinguish

the different paragraphs or sentences. A proviso will not be normally construed as reducing the purview of the enactment to a nullity, or to take away a right conferred by the enactment but if a proviso, on its true construction is directly repugnant to the purview of the enactment, the proviso shall stand and be a repeal of the purview, as it speaks the last intention of the makers. There is a distinction between "Proviso", "Exception" or "Saving Clause". "Exception" is intended to restrain the enacting clause to particular cases. "Proviso" is used to remove special cases from the general enactment and provide for them specially and "Saving Clause" is used to preserve from instruction certain rights, remedies or privileges already existing. If the proviso to Sub-section (1) of Section 218 is perused, it can be said that the proviso is a substantive provision. It is evident that it can be read as a substantive provision to the enactment that is, to Section 218(1), which provides that for every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately. The proviso thereto adds something substantive to the provisions of Section 218(1). The principles enunciated in the proviso to Section 218(1) cannot be applied to Section 218(2) since that would render the sub-section redundant.

37. What emerges from the above discussion is that the proviso to Section 218(1) cannot be read either into Section 218(2) or to Sections 219 to 223 of the Code. Similarly, the principles laid down in Section 218 cannot be read into Section 219. If, conversely, the provisions of Section 219 are read into Section 218, it would result into complete chaos and destruction of the principles laid down in Section 218 of the Code.

38. Mr. Premal Joshi, learned Counsel for the petitioner in Special Criminal Application Nos. 1716 to 1718 of 2005 has cited the judgment of the Supreme Court in Willie (William) Slaney Vs. The State of Madhya Pradesh, in aid of the proposition that Sections 233 to 240 (of the old Code) which dealt with joinder of charges must be read together and not in isolation. In para 39 of the judgment it has been clearly stated that these sections deal with the same subjects-matter and "set out different aspects of it. This judgment is of no help to. the learned Counsel for the petitioners because the question that fell for determination of the Court was an entirely different one i.e. whether the omission to frame an alternative charge u/s 302 of the IPC is an illegality, that cuts at the root of the conviction and makes it invalid or whether it is a curable irregularity.

39. In the light of the principles of law laid down in the Full Bench judgment in D.K. Chandra v. The State 1952 Cri LJ 779 (supra), this Court is of the firm view that Sections 218 to 224 of the Code, though dealing with the same subject-matter i.e. joinder of charges, contemplate different, situations, and the principles laid down in each section have to be applied to the different situations described in those sections, as intended by the Legislature. The provisions of one section cannot be read into the other and the doctrine of harmonious, construction, in this sense, cannot be adopted while reading these sections. To

read the principles laid down in Section 218 of the Code into Section 219 to Section 224 or vice versa, would result in enlarging the scope of each section and introducing principles foreign to the original enactment. It would go against the clear intention of the Legislature.

40. In view of the aforesaid discussion, the second submission made by the learned Counsel for the petitioners is rejected,

41. The orders dated 11-8-2004 passed by the learned 3rd Joint Civil Judge (JD) and J.M.F.C, Surat as also the orders in revision dated 30-7-2005 passed by the Presiding Officer, 11th Fast Track Court, which are impugned in Special Criminal Application No. 1261 of 2005 and the orders dated 25-1-2005 of the learned Chief Judicial Magistrate, Jamnagar as also the order in: revision of the learned Addl. Sessions Judge, dated 14-10-2005 impugned in Special Criminal Application Nos. 1716 to 1718 of 2005 suffer from no illegality or infirmity. Moreover, the learned Courts below have arrived at concurrent findings of fact which do not deserve to be interfered with. Even otherwise, Section 219 confers a discretion on the Court which may charge and try an accused at one trial if the conditions set out therein are satisfied. It does not provide that if the conditions stipulated are not fulfilled, the accused shall be tried at one trial. On; the facts, the discretion exercised by the learned. Magistrate, not to invoke jurisdiction u/s 219 of the Code which is confirmed by the Revisional Courts cannot be termed as arbitrary or erroneous, so as to warrant interference of this Court. Therefore, the petitions which are devoid of merits, deserve dismissal.

42. As a result of the aforesaid discussion, all the petition are dismissed. Rule is discharged in each relief granted in each petition stands vacated. Consequent upon the dismissal of the writ petitions, the Misc. Criminal Application Nos. 3804, 3814 and 3818 of 2007 do not survive, having become infructuous. They are accordingly disposed of.