

(1967) 06 GUJ CK 0005
In the Gujarat High Court

Case No : Criminal Appeal No's. 861 to 863 and 1154 to 1156 of 1965

Nandkishore Sakarlal

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 19-06-1967

Acts Referred:

Factories Act, 1948 — Section 101, 63, 92

Citation : (1968) 9 GLR 121 : (1967) 2 LLJ 806

Hon'ble Judges : D.A. Desai, J

Bench : Single Bench

Judgement

1. Criminal Appeals Nos. 861 to 863 of 1965 are filed against an order passed by the City Magistrate, Eleventh Court, Ahmedabad, in each of the criminal cases convicting Nandkishore Sakarlal, the occupier of the Sarangpur Cotton Manufacturing Company, Ltd., Ahmedabad, for having committed an offence under S. 63 read with S. 92 of the Factories Act, 1948 (hereinafter referred to as the Act), and sentencing him in each case to pay a fine of Rs. 210, in default to undergo simple imprisonment for one month.

2. Criminal Appeals Nos. 1154 to 1156 of 1965 are filed by Nandkishore Sakarlal, the occupier of the Sarangpur Cotton Manufacturing Company, Ltd., Ahmedabad (hereinafter referred to as the factory), against the orders of acquittal passed by the learned Magistrate acquitting Manecklal Jinabhai Kot, the manager, Harivallabh Maganlal, the supervisor, stamping department, and Chandulal Lallubhai the timekeeper of the Sarangpur Cotton Manufacturing Company, Ltd., of the charge under S. 63 read with S. 92 of the Act. All these appeals raise common questions of law and fact and therefore, I will dispose of the appeals by the judgment.

3. Criminal Appeals Nos. 861 to 863 to 1965 relate to complaints filed by Sri A. G. Shaikh, Legal Assistant, Factory Department Ahmedabad, against Nandkishore Sakarlal, the occupier of the factory, alleging that on 28 December 1964, Sri U. A. Pandya, Senior Inspector of Factories, Ahmedabad, visited the factory at 7-25

p.m. and found that the three workers, namely, Chandulal Chhaganlal, Rameshchandra Hatilal and Hatilal Thekarshi, were allowed to work otherwise than in accordance with the periods of work displayed on the notice-board in the factory. The Factory Inspector made a note of his inspection in the visit book on the same day. The occupier, i.e., Nandkishore Sakarlal, and the manager, Manecklal Jinabhai Kot, were not present in the factory at that time. The supervisor Harivallabh Maganlal, was present in the factory. He told the Factory Inspector that the workers were employed by him due to the pressure of work. The inspection notes of the Factory Inspector were forwarded to the occupier and he was asked to submit his explanation in respect of the irregularities that were noticed by the Factory Inspector. The occupier by his letter dated January 5, 1965 submitted an explanation stating that Harivallabh Maganlal, the stamping department on the date of the offence; that he had instructed Harivallabh as well as the departmental heads several times, in writing, as well as orally, not to employ workers otherwise than in accordance with the provisions of the Act; that he had appointed departmental heads who were responsible for observing the requirements of the provisions of the Act; that by a notification of the Government of India, No. CC Tech/Ahd/48-64/569, dated October 28, 1964, it was ordered that the mill should pack up approximately 2,200,000 metres of cloth during the period from October 20, to December 31, 1964, that up to December 28, 1964 morning 435,000 metres remained to be packed and they were to be packed and baled before December 31, 1964; that in the stamping department, there was an accumulation of about 800,000 metres of cloth which was ready for stamping and unless the said cloth was arranged in proper stacks and ketch slips attached to them, the said cloth could not be packed and baled and as this job could not be done by the ordinary stampers, the supervisor had asked the abovementioned three persons to work overtime in the second shift for about four hours for which they were to be paid. Harivallabh, the supervisor, did not inform the occupier or the manager or other officers of the factory but of his own accord and in order to meet with the above contingencies, had asked the abovementioned three persons to work overtime; that he came to know of the incident on the next morning at about 11-30 a.m. when he came to the mills and immediately preliminary order of suspension was served on the supervisor Harivallabh Maganlal. Chandulal Lallubhai, the timekeeper, was also served with a show-cause notice calling for an explanation as to why an action should not be taken against him for allowing this breach. The Factory Inspector, after obtaining the requisite sanctions, filed complaints against the occupier for committing breach of the provisions of S. 63 of the Act punishable under S. 92 thereof.

4. In his statement under S. 342 of the Criminal Procedure Code, the accused, that is the occupier of the factory, stated that he had not committed any offence and claimed exemption under S. 101 of the Act.

5. The learned trial Magistrate held that the accused had failed to give three clear days' notice in writing of his intention to have any other person whom he charged as the actual offender brought before the Court and that the accused

was not diligent in enforcing the execution of the provisions of the Act, and convicted the accused as aforesaid.

6. Manecklal Jinabhai Kot, the manager, Harivallabh Maganlal, the supervisor, stamping department, and Chandulal Lallubhai, the timekeeper of the factory, pleaded guilty to the charge, but they were acquitted as the occupier, Nandkishore Sakarlal, was not diligent in enforcing the provisions of the Act, and thus failed to prove his defence under S. 101 of the Act.

7. Sri D. K. Shah, appearing for the occupier, contended that the learned trial Magistrate was in error in holding that the occupier had failed to give three clear days' notice in writing of his intention to have any other person whom he charged as the actual offender brought before the Court. Sri Shah submitted that to claim an exemption under S. 101 of the Act, the occupier had to give three clear days' notice of his intention to have any other person whom he charged to have committed the breach of the provisions of the Act and these three days were to be calculated from the time appointed for hearing the charge. In these cases, the complaints were filed on March 22, 1965 against the occupier for contravening the provisions of S. 63 which is punishable under S. 92 of the Act. The summons were issued on these complaints and were made returnable on April 22, 1965. Summons were served on the occupier Nandkishore Sakarlal on April 21, 1965. The occupier appeared in the Court through a lawyer on April 22, 1965 and the lawyer gave an application in each of these cases requesting an adjournment on the ground that he had to take instruction from his client and therefore, the cases were adjourned to April 29, 1965. Similar applications were also given by the lawyer on April 29, 1965 and the cases were adjourned to May 13, 1965 for hearing the charge. In the meantime, the occupier had served notices, in each of these cases, on April 30, 1965 as required by S. 101 of the Act to the prosecutor, and intimating him of his intention to have the manager Manecklal Jinabhai Kot, the supervisor Harivallabh and the timekeeper Chandulal Lallubhai whom he charged as actual offenders to be brought before the Court at the time appointed for hearing of the charge. The complaints against the manager Manecklal, the supervisor Harivallabh and the timekeeper Chandulal were filed on May 6, 1965 by the occupier in the court of the learned Magistrate for having committed an offence under S. 63 read with S. 92 of the Act. The aforesaid notices were served on the prosecutor on April 30, 1965. It was, therefore, contended by Sri Shah that the material and effective date of hearing of the charges was May 13, 1965 and thus, in these cases, three clear days' notice in writing as contemplated by the provisions of S. 101 of the Act was given.

8. Sri Mehta, learned Assistant Government Pleader, contended that three clear days' notice as contemplated by S. 101 of the Act had not been given in these cases. The date appointed for hearing the charge in these cases was April 22, 1965. In pursuance of the complaints filed by the Legal Assistant, Factory Department, summonses were issued to the accused and the date mentioned for

hearing the charge was April 22, 1965. The cases were adjourned to April 29, 1965 and again to May 13, 1965, and these dates were adjourned dates on which the cases were to be heard. Sri Mehta submitted that the accused should have, therefore, given three clear days" notice as required by S. 101 of the Act before April 22, 1965 and that being not done, the accused was not entitled to exemption under the provisions of S. 101 of the Act. For the aforesaid proposition, Sri Mehta relied on the unreported judgment of Bhagwati, J., in Mohanlal H. Kansara v. State and others (Criminal Reference No. 76 of 1961 delivered on February 16, 1962). In that case the manager of the factory was charged for nonobservance of the working hours in respect of two workers, and two criminal prosecutions were launched against the manager. Summonses were issued against the accused and the time appointed for hearing the charge was mentioned in the summons. The hearing of the two cases was adjourned from time to time at the instance of the accused and ultimately the prosecution commenced the evidence on August 18, 1960. On that day, i.e., August 18, 1960, the accused filed a complaint against one Bhagwandas Ambalal Patel under S. 101 of the Act alleging that he had used due diligence to enforce the execution of the Act and that it was Bhagwandas Ambalal Patel, who had committed the offences in question without his knowledge, consent or connivance. The manager had also served on the prosecutor a notice on August 18, 1960 of his intention to have Bhagwandas Ambalal Patel brought before the Court at the time appointed for hearing the charges for having committed the offences. It was contended in that case that the accused had not given three clear days" notice of his intention to have Bhagwandas Ambalal Patel brought before the Court at the time appointed for hearing the charges for having committed the offences. It was contended in that case that the accused had not given three clear days" notice of his intention to have Bhagwandas Ambalal Patel brought before the Court at the time appointed for hearing the charges as contemplated by S. 101 of the Act as the notice was given on August 18, 1960. Sri Mehta particularly relied on the following observations in the judgment :

"Now in the present case I find that even if 18 August 1960 be taken as the date appointed for hearings the charge, the accused did not give to the prosecutor not less than three days" notice in writing of his intention to have Bhagwandas Ambalal Patel brought before the Court at the time appointed for hearing the charge since the notice though dated August 9, 1960 was actually served on the prosecutor on August 18, 1960, being the date appointed for hearing the charge. I will assume for the purpose of this argument that August 18, 1960 was the date appointed for hearing the charge though the learned Government Pleader contended - and I think there is great force in his contention - that the date appointed for hearing the charge was the date mentioned in the summonses issued to the accused and that August 18, 1960 was the adjourned date when the prosecution actually commenced evidence. But even if August 18, 1960 be taken as the date appointed for hearing the charge, it is clear that the accused did not comply with the second of the aforesaid two conditions since he did not

give to the prosecutor not less than three clear days" notice in writing of his intention to have Bhagwandas Ambalal Patel brought before the Court at the time appointed for hearing the charge. The accused was, therefore, not entitled to plead the exemption from liability provided by S. 101 and the learned Magistrate, once he came to the conclusion that the commission of the offences was proved against the accused, was right in convicting the accused of the offences and sentencing him for the same."

9. In order to determine the question at issue, I will first refer to S. 101 of the Act which runs as under :

"101. Exemption of occupier or manager from liability in certain cases. - Where the occupier or manager of a factory is charged with an offence punishable under this Act, he shall be entitled, upon complaint duly made by him and on giving to the prosecutor not less than three clear days" notice in writing of his intention so to do, to have any other person whom he charges as the actual offender brought before the Court at the time appointed for hearing the charge; and if, after the commission of the offence has been proved, the occupier or manager of the factory, as the case may be, proves to the satisfaction of the Court -

(a) that he has used due diligence to enforce the execution of this act, and

(b) that the said other person committed the offence in question without his knowledge, consent or connivance

that other person shall be convicted of the offence and shall be liable to the like punishment as if he were the occupier or manager of the factory, and the occupier or manager, as the case may be, shall be discharged from any liability under this Act in respect of such offences :

Provided that in seeking to prove as aforesaid, the occupier or manager of the factory, as the case may be, may be examined on oath and his evidence and that of any witness whom he calls in his support shall be subject to cross-examination on behalf of the person he charges as the actual offender and by the prosecutor :

Provided further that, if the person charged as the actual offender by the occupier or manager cannot be brought before the Court at the time appointed for hearing the charge, the Court shall adjourn the hearing from time to time for a period not exceeding three months and if by the end of the said period the person charged as the actual offender cannot still be brought before the Court, the Court shall proceed to hear the charge against the occupier or manager and shall, if the offence be proved, convict the occupier or manager."

10. The provisions of this section make it clear that in order that the occupier should claim an exemption, he must fulfill two conditions, namely :

(1) he should make a complaint against the other persons whom he wishes to charge as actual offender, and

(2) he should give to the prosecutor not less than three clear days" notice in

writing of his intention to have the person brought before the Court at the time appointed for hearing the charge.

11. After having fulfilled these conditions, the occupier has to satisfy the Court that he has used due diligence to enforce the execution of the Act and that the persons whom he had charged for having committed the offence have done so without his knowledge, consent or connivance.

12. In the light of the aforesaid provisions of law, I will now consider the argument of Sri Shah that the occupier had fulfilled the aforesaid conditions and had used due diligence to enforce the execution of the Act.

13. It is undisputed that in these cases the date for hearing the charge was fixed on April 22, 1965 and the summons for hearing the charge was served on April 21, 1965. On April 22, 1965 and April 29, 1965, applications were given by the lawyer of the accused for adjournment of the cases on the ground that he had to take instruction from the client and the cases were adjourned. The roznamas recorded by the learned Magistrate on each of these cases show that on April 22, 1965 and April 29, 1965, the cases were adjourned for statement of the accused and on May 13, 1965, the plea of the accused was recorded and the cases were adjourned again to June 8, 1965 for hearing and recording of the evidence. The charge in each of these cases was explained to the accused, on May 13, 1965. Section 101 of the Act provides that a notice must be given by the occupier to the prosecutor of not less than three clear days and this time is to be calculated from the date appointed for hearing the charge. The date appointed for hearing the charge must mean that the date on which the accusation is to be explained to the accused. In these cases, the accusation was explained to the accused on May 13, 1965 and the notices to the prosecutor of the occupier's intention to proceed against the persons, who in his opinion had committed the actual offence were to be brought before the Court were given on April 30, 1965. Thus, three clear days' notice as contemplated by S. 101 of the Act has been given in these cases. In Mohanlal H. Kansara case (vide supra) the notice as contemplated under S. 101 of the Act was given by the occupier on the date when the prosecution actually commenced the hearing and recording of the evidence and therefore, it was held that the notice which was given by the occupier was not a legal and valid notice. The facts of the present cases reveal that accusation was to be explained only on May 13, 1965, i.e., that was the date appointed for hearing the charge. The summonses had mentioned that the charge was to be heard on April 22, 1965; but the hearing of the charge was subsequently postponed to April 29, 1965 and May 13, 1965 and the charge was actually explained on that date. Therefore, the time appointed for hearing charge, i.e., the date on which the accusation was to be explained in these cases, was May 13, 1965. The phrase "at the time appointed for hearing the charge" occurring in S. 101 of the Act must mean the time fixed for explaining the accusation to the accused. The procedure to be followed by the learned Magistrate for the trial of an offence under S. 63 read with S. 92 of the Act is the

procedure which is followed in the trial of summons cases and S. 243 of the Criminal Procedure Code required that

"when the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted."

14. This provision casts a duty on the Court to explain the accusation to the accused. Section 101 of the Act when it refers to "at the time appointed for hearing the charge" implies the time when this accusation is to be explained to the accused under S. 242 of the Criminal Procedure Code. It should be noted that phrase does not refer to the first date fixed for hearing the charge but refers to the date of hearing the charge, i.e., the date on which the accusation is to be explained to the accused. In my opinion, therefore, the notices which have been given to the prosecutor by the occupier of his intention to have the manager Manecklal Jinabhai Kot, the supervisor Harivallabh Maganlal and the timekeeper Chandulal Lallubhai, the persons whom he charged as actual offenders to be brought before the Court at the time appointed for hearing the charge were valid and legal notices and the learned Magistrate was in error in holding that the notices were not legal and according to law.

15. The learned Magistrate has held that there was no evidence on the record to show that the accused had knowledge or consented or connived at the other person committing the offence and this finding has not been challenged before him.

16. Sri Shah then urged that the finding of the learned trial Magistrate that the accused was not diligent in enforcing the provisions of the Act was erroneous. Sri Shah submitted that the Factory Inspector in his evidence admitted that Nandkishore Sakarlal, the occupier and Manecklal Jinabhai, the manager of the mills, were not present at the time when the Inspector visited the mills. The evidence of the occupier also proved that he had appointed heads in each department and had instructed them, both orally as well as in writing, to strictly comply with the provisions of the Act and particularly instructed them that there should not be double employment. The occupier has proved circulars and instructions intimating the supervisors not to employ workers in breach of the provisions of the Act. The manager was appointed for general supervision and his function was to observe that the legal provisions had been complied with. When the occupier was informed of these offences, the manager, the supervisor and the timekeeper were suspended and explanations were sought from them. The supervisor Harivallabh had also committed a similar offence on May 26, 1961 and at that time he was suspended for four days. This evidence of the witness had not been challenged in the cross examination. The manager, the supervisor and the timekeeper were responsible for the offences and they categorically admitted their guilt and there was nothing on the record to show that this was the result of collusion between the occupier and the employees or that they had done so to oblige the occupier. On the basis of this evidence on record, Sri Shah argued that

the occupier had taken due diligence in enforcing the execution of the provisions of the Act. The occupier had fulfilled all the conditions to earn an exemption under the provisions of S. 101 of the Act and therefore, he was entitled to an acquittal in all cases. Sri Shah relied on the judgment of the Supreme Court in *Maneklal Jinabhai Kot Vs. State of Gujarat and Others*, and particularly on the following observations at p. 728 :

"The point to be noted, in the evidence of the Factory Inspector, and of the appellant, is that the Inspector admits that the appellant was not present at the time of his inspection and that respondent 3 was present and that respondent 2 is the salesman and respondent 3, the supervisor. He accepts that particular persons have been appointed in the mill as heads of the various departments and that the salesman is generally the head of the cloth department, including the stamping department. He also admits that the appellant has issued notices, Exs. 9 to 12, warning the heads of departments to strictly comply with the provisions of the Act and also stating that there should be no double employment. The appellant's evidence, that respondent 2 was in charge of the cloth department, at the material time, and that he has been warned against double employment on several occasions, and that he was not aware of the employment of the workers concerned, in the third shift on the morning of 26 May 1961, have not been challenged. The answers given by the appellant that he did not give his consent to the working of those concerned workers and that he has no knowledge about their having worked at the material time, are not also seriously challenged. More than that, there is absolutely no suggestion made to the appellant that there is any sort of collusion between him and respondents 2 and 3, and that the latter are merely admitting the offence in the cross-complaint filed by the appellant, to oblige him. Respondents 2 and 3 have categorically admitted the offence mentioned against them in the cross-complaint; and the appellant has not been cross-examined by them, as they are entitled to, under the first proviso to S. 101. We are particularly referring to some of these aspects, because, in our opinion, these are all matters which should have been properly taken into account, by the Magistrate and the High Court, for considering the question as to whether the appellant has proved, to the satisfaction of the Court, the two essential matters dealt with by Cls. (a) and (b) of S. 101 of the Act."

17. In my opinion, Sri Shah is right in his contentions. The evidence on record establishes that the appellant was not present at the time when the Inspector visited the factory, that he appointed efficient persons as heads of the departments and had instructed them by issuing circulars to comply with the provisions of the Act. The evidence also discloses that Harivallabh had employed the workers without consulting the occupier. The learned trial Magistrate has held - and the said finding has not been challenged before me - that the occupier had no knowledge of double employment and that he had not consented to or connived at the double employment of these workers. The occupier has, in these cases, satisfied all the conditions of S. 101 of the Act and therefore, the learned trial Magistrate was in error in convicting the occupier under the provisions of S.

63 read with S. 92 of the Act. The learned trial Magistrate was also in error in acquitting Manecklal Jinabhai Kot, the manager, Harivallabh Maganlal, the supervisor and Chandulal Lallubhai, the timekeeper, of offences under S. 63 read with S. 92 of the Act. The three accused had pleaded guilty to the offence with which they were charged. I, therefore, hold that Manecklal Jinabhai, Harivallabh Maganlal and Chandulal Lallubhai are guilty of the offence under S. 63 read with S. 92 of the Act and sentence each of them to pay a fine of Rs. 210, in default to suffer simple imprisonment for one month in each of the Criminal Appeals Nos. 1154 to 1156 of 1965. The orders of acquittal of Manecklal Jinabhai, Harivallabh Maganlal and Chandulal Lallubhai are set aside and Criminal Appeals Nos. 1154 to 1156 of 1965, are allowed.

18. The orders of conviction of the occupier of the factory, Nandkishore Sakarlal, in Criminal Appeals Nos. 861 to 863 of 1965 are set aside and he is acquitted in all the three appeals. The fine, if paid by the occupier, to be refunded. Criminal Appeals Nos. 861 to 863 of 1965 are allowed.