

(1962) 02 MP CK 0019
In the Madhya Pradesh High Court
Case No : Criminal Appeal No. 495 of 1961

State	Vs	APPELLANT
Umashankar Laxminarayan Jaiswal and Another		RESPONDENT

Date of Decision : 28-02-1962

Acts Referred:

Factories Act, 1948 — Section 106, 33, 92
Limitation Act, 1908 — Section 23

Citation : AIR 1962 MP 311 : (1962) 5 FLR 459 : (1963) ILR (MP) 518 : (1962) JLJ 789 : (1962) 2 LLJ 256 : (1962) 7 MPLJ 723 : (1962) MPLJ 723

Hon'ble Judges : T.P. Naik, J; C.B. Kekre, J

Bench : Division Bench

Advocate : R.J. Bhawe, for the Appellant; A.P. Sen and A.H. Saifi, for the Respondent

Final Decision : Allowed

Judgement

Naik, J.

This is an appeal by the State Government against the acquittals of the respondents (accused) of offences punishable u/s 92 of the Factories Act, 1948 (hereinafter referred to as "the Act").

A complaint was filed in the Court of Magistrate First Class, Seoni, by the Chief Inspector of Factories against the respondents (accused) alleging that they were the occupier and the manager respectively of the Seoni Distillery, Seoni; that on 26-3-1959, when the aforesaid distillery was inspected by the Inspector of Factories, it was found that the fermentation vats of the distillery were not securely fenced by railings or by any safety devices as required by Section 33 of the Act and that they thus committed an offence punishable u/s 92 of the Act.

Respondent No. 2, on 19-8-1959, filed a written objection to the maintainability of the aforesaid complaint on the ground that the offence having come to the knowledge of the Inspector on 27-10-1957, the complaint was barred by

limitation u/s 106 of the Act.

It is not disputed that formerly the Inspector had inspected the distillery on 27-10-1957, 2-2-1958 and 23-10-1958 also and had raised similar objections.

The trial Court, relying on an unreported decision of Pandey, J. in *Shaligram Mehta v. State of M.P.*, Criminal Revn. No. 274 of 1958, D/-23-6-1959 (M. P.), held that as the complaint in the instant case had not been filed within three months of 27-10-1957, the date when the breach of the section first came to the knowledge of the Inspector, it was barred by time. Accordingly he dismissed the complaint and acquitted the respondents-accused.

The appeal, therefore, raises a short question whether, under the circumstances of the case, the complaint was barred by limitation u/s 106 of the Act.

The relevant portion of the aforesaid section is in the following terms:

"No Court shall take cognisance of any offence punishable under this Act unless complaint thereof is made within three months, of the date on which the alleged commission of the offence came to the Knowledge of an Inspector..."

The learned counsel for the State contends that the omission to securely fence the fermentation vats was a continuing offence, i.e., it was an offence *de die in diem*, so that every day's, non-compliance with the provisions of Section 33 constituted a new offence and consequently so long as a complaint was filed within three months of the day when the offence was alleged to have been committed or to have come to the knowledge of the Inspector, it was within time.

In our opinion, the contention is correct and shall have to be upheld. Section 33 provides that the fermenting vats shall be securely fenced. If they are not so fenced, there is a contravention of the provisions of a section under the Act; and Section 92 of the Act says that such contravention shall be punishable as an offence. The complaint in the instant case alleges that on 25-3-1959 the fermentation vats were not securely fenced and if that is proved, we have no doubt that an offence was committed, on that date. As regards limitation, the contravention complained of was of a date which was within three months of the date of the complaint and was thus within time u/s 106 of the Act.

In *Verney v. Mark Fletcher and Sons Ltd.*, 1909 1 KB 444, Lord Alverstone, C. J., while dealing with a similar situation created by Section 146 of the Factory and Workshop Act 1901 1 Edw. 7., which laid down that the information shall be laid within three months after the date on which the offence comes to the knowledge of the Inspector, said:

"The information in the present case charges the respondents that their factory was on July 1, 1908, not kept in conformity with the Act by reason of the omission to fence their fly-wheel. If that be proved, I have.....not the slightest doubt that there was on July 1 a direct and continuing breach of the provisions of Section 10. It is said that because in May, 1905, and again in March, 1908, the

fly-wheel was unfenced, to the knowledge of the inspector, and the information was not laid until July 22, 1908, the requirements of Section 146 have not been complied with. In my opinion an offence was committed on July 1, 1908, just as much as in March, 1908, or May, 1905, and the offence committed on July 1 came to the knowledge of the inspector on that day, when he visited the respondents' factory. I, therefore, come to the conclusion that the information was laid in time."

In *The Public Prosecutor Vs. Veerabhadrappe Lakshminarayana Setty, , Govinda Menon, J.*, following an earlier decision of Subba Rao, J. in criminal revn. case No. 417 of 1950 (Mad) and the aforesaid decision of the King's Bench Division, held:

"In the present case, as we have already held, the offence committed is a continuing one, and when the Inspector visited the factory on the second occasion on 24th January 1951, the offence committed on that date came to his knowledge on that day, and the prosecution having been launched within three months of that date is in time," To the same effect are the decisions in *State Vs. A.H. Bhiwandiwalla*, and *The State Vs. Mool Chand*, (2) and we respectfully agree with the aforesaid decisions. Again in *The State Vs. Kunja Behari Chandra and Others*, ,; which was a case under the Mines Act (1923), a similar view based on the provisions of Section 42 of the Act, which is analogous to the provisions of Section 106 of the Factories Act, was taken.

The learned counsel for the respondents, however, contends that even if the offence be held to be a continuing one, the policy of the Act is that any contravention of any of the provisions of the Act shall be the subject-matter of a speedy complaint within three months of the first contravention or of the date when the contravention first comes to the knowledge of the Inspector; that if any date during which the offence was continued is selected as the starting point for limitation, the provisions of Section 106 of the Act would be rendered nugatory; and that the selection of any day on which the offence was continued as the starting point for limitation depends on the application of the principle embodied in Section 23 of the Limitation Act but that the principle underlying that section is inapplicable to the Factories Act, 1948 because it is a special Act to which Section 23 is not attracted because of the bar created by Section 29 of the Limitation Act. Reliance is placed on the decision of Pandey, J. *supra* and on the decision in a Calcutta case, viz., *G.D. Bhattar and Others Vs. The State*, , on which Pandey, J. had also relied.

In our opinion the contentions are misconceived. There can be no doubt that every day a contravention is continued while the factory is worked a fresh offence is committed for which the occupier and the manager would be liable.

An offence may be committed by the doing of a positive act prohibited by law or by the omission to do that which the law makes it obligatory to do on pain of punishment. So far as the first is concerned, there can be no doubt that an

offence is committed as many times as the positive act is done. In the latter case also, the position is not any different. Law expects the fulfilment of an obligation every moment and consequently every day that the omission is not rectified by the performance of the positive duty, an offence is committed. No doubt, technically every moment's contravention of any of the provisions of the Act is punishable as a separate offence; but as repetition in the same transaction of several criminal acts of exactly the same character constitutes one crime, we take into account all the contraventions of the day and call it one offence. This also accords with the practice that we do not take into account fractions of a day for computing limitation, and further because Section 92 of the Act, while providing for the continuance of a contravention after a conviction, says that a penalty at the rate of Rs. 75/- for each day on which the contravention is continued may be levied. This can be interpreted to mean that in the case of continued contraventions the law intends to give locus paenitentiae to the accused to rectify the omission till the last moment of the day, which as defined in Section 2(e) of the Act, means "a period of twenty-four hours beginning at midnight".

It would be noted that Section 92 of the Act uses an expression, "the contravention is continued", and from this it is sought to be argued that the contravention is not (sic)ant to be punishable de die in diem as a separate fresh offence every day, unless Section 23 of the Limitation Act or the principle underlying it were to be invoked,

We shall, therefore, briefly examine the concept underlying the expression "continuing" when used in connection with crimes. To continue" means to remain in existence, not to cease. So that, when an offence is the product of a positive act, it is complete when the act ceases; and every repetition of such an act is designated a recurring offence. But, when the offence is the result of an omission to do a positive duty, non-compliance on the first day with any of the provisions of the Act enjoining such duty is, no doubt, an offence complete in itself on that day as explained in paragraph 14 above, but it does not cease that day. Nor does it recur in the sense stated above, unless the omission were to be rectified first and then a fresh omission were to take place. But, even so, without its recurrence in the sense explained above, it is nonetheless a fresh offence when the omission is continued the day after it was first committed and every day thereafter. This state of affairs when the omission of the first day is not rectified and is, therefore, continued on the following days involving fresh defaults, every day till the omission is rectified, is compendiously called a "continuing" offence. The expression "contir (sic) is thus descriptive of such a state of affairs and is; used in connection with crimes which are the results of omissions and in order to contradistinguish them from the recurring or successive offences.

Section 23 of the Limitation Act also uses the expression "continuing" in the sense explained above, but in relation to civil liabilities. It speaks of "a continuing" breach of contract" and of a "continuing wrong independent of

contract" without defining what those expressions mean. For that we have to resort to the general law, where the expression means nothing more than that the "breach" or the "wrong" is not the result of a single positive act but is the result of neglects or defaults which continue to exist over a number of days, so that fresh neglects or defaults are deemed to occur every day giving rise to fresh causes of action. As explained in AIR 1949 1 (Orissa) at p. 9, "to give rise to a continuing wrong there must not be a single act from which injurious consequences follow, but there must be a state of affairs every moment's continuance of which is a new tort". "A continuing breach of contract" and "a continuing wrong independent of contract" are thus expressions used to denote and classify those breaches and wrongs which are not committed, once and for all (though their consequences and damages arising from them may be continuous or intermittent) but are deemed to be committed every day giving rise to a fresh cause of action *de die in diem* so long as the wrongful state of affairs subsists. In the words of the Lahore High Court in *Khair Mohammad v. Mst. Jannat* ILR 1941-22 Lah 22 at P. 28: (AIR 1940 Lah 359 at p. 360).

"in considering whether the particular act complained of constitutes a "continuing wrong" within the meaning of Section 23, for which the cause of action arises *de die in diem*, it is necessary to keep in mind the distinction between an "injury" and the "effects of that injury". Where the injury complained of is complete on a certain date, there is no "continuing wrong" even though the damage caused by that injury might continue, in such a case the cause of action to the person injured arises, once and for all, at the time when the injury is inflicted, and the fact that the effects of the injury are felt by the aggrieved person on subsequent occasions intermittently or even continuously does not make the injury a "continuing wrong" so as to give him a fresh cause of action on each such occasion. If, however, the act is such that the injury itself is continuous, then there is a "continuing wrong" and the case is governed by Section 23."

In respect of such "breaches" and "wrongs" which are continuing, in the sense explained above, Section 23 says that a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues. The section says no more than what is implied in the "breaches" and "wrongs" being continuous giving rise to a cause of action *de die in diem* so long as the wrongful state of affairs is continued, *ft* fresh period of limitation arises for every fresh cause of action. Consequently if "continuous breaches and wrongs" furnish fresh causes of action *de die in diem*, fresh periods of limitation shall run for every day's default. The section thus prevents a suit being barred as long as the breach or the wrong continues, though the only causes of action which can be sued upon would be those which are within the period of limitation.

It would thus be seen that the conception underlying the word "continuing" is the same whether it is considered in relation to breaches of contracts or wrongs independent of contracts or offences--the conception being that so far as

"breaches" and "wrongs" are concerned, they give rise to a fresh cause of action de die in diem so long as the wrongful state of affairs subsists, and so far as offences are concerned they give rise to a fresh offence de die in diem so long as the omission which has been made penal by the statute is not rectified. Explaining the connotation of the expression "continuing offence", *Jamuar J. in The State Vs. Kunja Behari Chandra and Others*, (supra), said :

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

This being the position, we do not see how the non-prosecution for the first day's default would condone the subsequent defaults in respect of which the prosecution would be within time. It may be the policy of the Act that proceedings in respect of contraventions of the Act should be speedily reported and remedied; but is it meant to be suggested that if the Inspectors are negligent in launching prosecutions or indulgent in giving time to the defaulters to remedy the defects, the defaulters acquire a charter to keep the fermenting vats unfenced for ever? Because if the contention of the accused is accepted, that would be the result and all that the accused shall have to do is to stall for time till the limitation expires and then be free from the obligations under the provisions of the Act and the Rules which are made for the safety and well-being of the factory workers. A result so startling as this could never have been in the contemplation of the Legislature and any interpretation of the section which produces such a result has, in our opinion, to be avoided.

We may examine the question from another angle also. The non-prosecution of the accused for the first default could not have placed him in any better position than as if he were acquitted for that default. But what relevance the acquittal or conviction of the accused for the first offence would have so far as their liability for the contravention of the provisions of the section on 26-3-1959 is concerned? Could they have pleaded *autrefois* acquit or *autrefois* convict? We do not think they could, because the contravention on 26-3-1959 would be quite independent of the contravention on 27-10-1957 or on any other date. It would, as pointed out above, be a fresh contravention for which the liability would be quite independent of the contravention on any other date.

It is then asked what the purpose of the section (Section 106) creating limitation is? In our opinion, the purpose is plain. Without limitation a prosecution could have been launched any time; but the Legislature wanted a definite time limit for it. So that any contravention beyond the three months limit could not be punished, nor could that be taken into account for any other purpose, such as, for the purpose of imposing continuing fines u/s 92 of the Act, or for imposing an enhanced penalty u/s 94. The question directly arose in *Reg. v. Chertsey*, 1961-2 WLR 442, where a farmer failed to comply with an enforcement notice requiring him to discontinue the use of certain land as a caravan site and was convicted of

an offence u/s 24(3) of the Town and Country Planning Act, 1947. He continued to ignore the notice and on July 2, 1958, he was convicted of a further offence under the section. As he still continued the offending use, on November 13, 1958, an information was laid against him alleging that he had continued to use or permit the land to be used in contravention of the terms of the notice and of Section 24(3), but that information was not heard until March 9, 1960, on which date justices convicted him and fined him E. 1,338. Stating the decision of the justices, the chairman said that they would impose a fine at the rate of ₹3 a day from the date of the last conviction, which was 446 days earlier. The notice of fine served on the farmer did not disclose the basis of the fine. On an application for an order of certiorari, the Court of Queen's Bench presided over by Lord Parker, C.J., Winn and Widgery, JJ., inter alia, held:

"(1) That the offence was a continuing offence which occurred from day to day, and the justices were precluded by Section 104 of the Magistrates' Courts Act, 1952, from hearing the information in so far as it alleged an offence occurring more than six months before its date.

(2) That on the true construction of the words in the final sentence of Section 24(3) of the Town and Country Planning Act, 1947, a person who committed a further offence was liable to a fine not exceeding ₹20 for every day on which an offence triable by the justices was committed, and therefore, as the justices were not, by virtue of Section 104 of the Magistrates' Courts Act, 1952, concerned with an offence committed on any day more than six months prior to the date of the information, they could not impose a daily penalty in respect of any such day."

We are, therefore, of opinion that the limitation provided u/s 106 of the Act only prescribes a trial jurisdiction for the Magistrate trying the case, so that in respect of an offence falling in point of date within the three months period he has jurisdiction to entertain and try the complaint and, for an offence outside that period, he has no such jurisdiction.

The contention based on the analogy of Section 23 of the Limitation Act is equally misconceived. It cannot be disputed that that section *proprio vigore* does not and cannot apply as it is concerned with breaches of contracts and wrongs independent of contract, and not with offences. And, as regards the principle underlying the section, it is of universal application, because all it says is that if a fresh cause of action arises, it gives rise to a fresh starting point for limitation. In its application to criminal cases, it would only mean that if a continuing offence gives rise to a fresh offence *de die in diem*, such fresh offence shall give rise to a fresh starting point for limitation. We do not consider that we need the help of Section 23, nor that the principle underlying therein is not applicable to such a situation unless specifically made applicable by the Act.

Shaligram Mehta's case, Cri. Revn. No. 274, of 1958, DA 23-6-1959 (MP), no doubt, dealt with, the provisions of Section 73 and Section 79 of the Mines. Act;

but Section 79 of the Mines Act is analogous to Section 106 of the Factories Act. The principle underlying both the sections for the purpose of computing limitation is the same. In our opinion, therefore, in so far as that case laid down that there could be no conviction for a continuing contravention unless there be a previous conviction for what may be called the original or primary contravention, is erroneous and has to be overruled. We also do not agree, for the reasons given above, with the decision reported in (S) G.D. Bhattar and Others Vs. The State, , which lays down that it was not open to the prosecution to select any particular date following the contravention and launch a prosecution within the special period prescribed in the Act on the footing that there was a fresh contravention on that date and that the earlier contravention should be ignored.

In the result, the revision application is allowed. The order of the trial Court dismissing the complaint as barred by time is hereby set aside and the case shall now go back to the trial Court for being dealt with in accordance with law.