

(1994) 02 GUJ CK 0036
In the Gujarat High Court

Case No : Criminal Appeal No's. 271-276 and 278 of 1989

State of Gujarat

APPELLANT

Vs

Maganlal Gordhandas Merchant

RESPONDENT

Date of Decision : 25-02-1994

Acts Referred:

Constitution of India, 1950 — Article 20
Criminal Procedure Code, 1973 (CrPC) — Section 258, 397, 401
Factories Act, 1948 — Section 92
Gujarat Factories Rules, 1963 — Rule 110A, 94, 95(1)

Citation : (1995) CriLJ 1581 : (1994) 1 GLR 799 : (1995) 1 LLJ 206

Hon'ble Judges : M.S. Parikh, J

Bench : Single Bench

Advocate : S.R. Divetia, S.P. Dave, J.A. Shelat and M.A. Bukhari, apps, for the Appellant; B.N. Keshwani, for the Respondent

Final Decision : Allowed

Judgement

M.S. Parikh, J.—This group of acquittal appeals arise from the orders stopping the proceedings of various criminal cases u/s 258 of the Code of Criminal Procedure, 1973 (II of 1974) and since some common questions of importance arise, they are dealt with in this common judgment.

2. A preliminary objection has been raised by Mr. B.N. Keshwani, learned Advocate appearing on behalf of the respondents, to the effect that all these acquittal appeals would not be maintainable as the impugned orders do not render acquittal of the accused persons. He in the alternative supported the impugned order by submitting that on account of a single visit on May 18, 1988, even if violations of more than one provisions of the Factories Act, 1948 (hereinafter referred to as "the Act") and the Gujarat Factory Rules, 1963 (hereinafter referred to as "the Rules") are committed, only one complaint could be filed and the accused persons could not be visited with double sentence. In reply, the learned A.P.Ps. who have appeared in various appeals, submitted that violation of various provisions of the Act and the Rules would disclose distinct

offences. It was further submitted by them that even offences would be distinct for violations of the relevant provisions of the Act and the Rules, per worker.

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3. At the outset it should be noted that for each distinct offence a separate complaint can be filed and filing of a complaint per visit by the complainant is not warranted by any of the provisions of the Act and the Rules.

4. In Criminal Cases Nos. 746, 747, 748, 754, 755, and 756 of 1988, which were taken up by the learned Magistrate, the violation was of Rule 110-A on the allegation that the concerned worker was found attending to the work of printing sarees in the factory visited by the complainant and upon being required to show the identity card in Form No. 36, it was found that no such identity card was issued to the said worker in each case. There, the violation which was complained of, was of Rule 110-A.

In Criminal Case Nos. 752 and 759 of 1988 Rule 94 of the Rules is alleged to be violated for not maintaining the leave register in Form No. 18.

In Criminal Cases Nos. 749, 750, 751, 757 and 758 of 1988 Rule 95 (1) of the Rules is alleged to be violated for not providing the leave book to the concerned workers.

5. It can, therefore, be seen that the violations which are complained of in all these matters are of Rules 110-A and 94 and 95(1) of the Rules. It would, therefore, be appropriate to reproduce the said Rules

Rule 94 of the Rules reads as under; "94. Leave with Wages Register:

(1) The Manager shall keep a Register in Form No. 18 hereinafter called the Leave with Wages Register;

Provided that if the Chief Inspector is of opinion that any muster roll or register maintained as part of the routine of the factory, or return made by the Manager, gives in respect of any or all of the workers in the factory the particulars required for the enforcement of Chapter VIII of the Act, he may by order in writing, direct that such muster roll or register or return shall, to the corresponding extent, be "maintained in place of and be treated as the register or return required under this Rule in respect of that factory.

(2) The Leave with Wages Register shall be preserved for a period of three years after the last entry in it and shall be produced before the Inspector on demand."

Rule 95 of the Rules deals with Leave Book and Sub-rule (1) reads as under :

" (1) The Manager shall provide each worker with a book in Form No. 19 (hereinafter called the Leave Book). The Leave Book shall be the property of the worker and the Manager or his agent not demand it except to make relevant entries (herein and shall not keep it for more than a week at a time."

Rule 110-A deals with identity cards required to be issued to the workers and it reads as under:

"(1) The Manager of every factory shall provide to each worker an identity card with photograph, free of cost, in Form No. 36 and shall enter the serial number of such card against the name of such worker in the register of adult workers maintained by him u/s 73 read with Rule 93, as the case may be."

6. It is not in dispute that violation of the provisions of the Act and the Rules is made punishable by virtue of Section 92 of the Act Section 92 reads as under :

"92. General penalty for offences : Save as it otherwise expressly provided in this Act and subject to the provisions of Section 93, if in, or in respect of any factory there is any contravention of the provisions of this Act or of any rules made thereunder or of any order in writing given thereunder, the occupier and manager of the factory shall each be guilty of an offence and punishable with imprisonment for a term which may extend to two years or with fine which may extend to one lakh rupees or with both, and if the contravention is continued after conviction, with a further fine which may extend to one thousand rupees for each day on which the contravention is continued."

As the offences sought to be charged against the accused persons are not under Chapter IV or any Rule made thereunder or Section 87 of the Act resulting in an accident causing death or serious bodily injury in respect of which a different provision has been made in the proviso to the aforesaid Section, the proviso is not reproduced.

7. On a plain reading of the charging provision, it can be seen that the occupier and the Manager of the factory would be guilty of an offence if there is any contravention of the provisions of the Act or any Rules made thereunder. The Act and the Rules made thereunder provide a legislation beneficent in nature and different obligations are prescribed in different provisions of the Act and the Rules. It would, therefore, be clear on a plain reading of Section 92 that violation of each of the relevant provisions of the Act or of the Rules would make a distinct offence. It has, therefore, to be seen what is the nature of the obligation provided under Rules 94, 95(1) and 110-A of the Rules. Under Rule 94 the Manager of a factory is required to keep a register in Form No. 18 called Leave with Wages Register. It would, therefore, be obvious that violation of such an obligation would provide one distinct offence. However, it is not understandable how there can be more than one offences worker-wise for violating the provision of not keeping a register in Form No. 18 or the Leave with Wages Register. The language of the provision contained in Rule 94 does not warrant for canvassing such an argument. The relevant consideration would be the nature of obligation under the Rule or the provision of law, which is required to be considered. Then comes the violation of Rule 95(1) of the Rules. The obligation cast upon the Manager of a factory is to provide each worker with a leave book in Form No. 19 known as "leave book". Applying the test of nature of obligation as hereinbefore

said, Rule 95(1) would make a departure. The words indicating providing of leave book to each worker assume importance in construing Rule 95(1). The obligation is for each of the workers working in the factory and it cannot be said that if leave book is not provided to some of the workers and it is provided to some of the workers, the offence would be one and not distinct for each of the workers not provided with the leave book. It is in this connection that two of the decisions referred to by the learned A.P.P. would assume importance in construing this provision. The first one is the case of *Emperor v. J.B.H. Johnson* ILR.(1919) Bom.89. A Division Bench of the Bombay High Court was concerned with the interpretation of Section 29 read with Section 41 (a) of the Indian Factories Act, 1911. The employment of labour after prescribed hours was prohibited under the relevant provisions. The accused manager of a textile mill employed 18 workmen to work at his mill after 7.00 p.m. in violation of the provisions of Section 29(1), which was under consideration by the Bombay High Court. There were 18 prosecutions against the accused who came to be convicted and sentenced separately in each case. On appeal, he was acquitted in all cases except one in which the conviction and sentence was confirmed. The appellate Court held that the employment of a labour was a single offence u/s 41(1) of the said Act read with Section 29(1) thereof. Before the High Court reference was made to Section 71 of the Indian Penal Code in support of the appellate Court's judgment of acquittal in all cases except the one holding that it was a single offence. The High Court held that in view of the fact that the offence under the aforesaid provisions for consideration by the High Court when it consisted employing each workman after the prescribed hours was distinct and separate, it could not be said that it was one offence collectively merely by the fact that the offences were committed at the same point of time. It clearly appears from the reading of the judgment in the case of *Emperor v. J.B.H. Johnson* (supra) that the nature of the offence flowing from the nature of the obligation under the aforesaid provision for consideration by the High Court was basis for finding that the obligation was distinct and separate in respect of each labourer employed after prescribed hours.

8. In *Vrijvallabhdas v. Emperor* AIR 1921.Bom.322 Section 41 of the Indian Factories Act, 1911 was again for consideration by a Division Bench of the Bombay High Court. u/s 41, if any person is employed or allowed to work contrary to any of the provisions of the Act, the occupier and the manager is jointly and severally liable to a fine which may extend to Rs. 200/-. The High Court held that the liability was for as many workers as unlawfully employed in violation of the relevant provisions read with Section 41 of the Indian Factories Act, 1911. However, construing the provisions strictly it was further held that the maximum fine which could be imposed was Rs. 200/- between the occupier and the manager.

9. Mr. Keshwani, learned Advocate appearing for the accused (respondents herein), submitted a decision of the Madras High Court in *In re, Vonka Venkataratnam* AIR.1935. Mds.301. for canvassing a submission that violation of one provision of the Act would reflect one distinct offence but there cannot be

worker- wise offences as a result of violation of a particular provision of the Act or the Rules. In the case before the Madras High Court the provision that was alleged to have been violated was regarding employing persons on Sunday without (a) giving them a compensatory holiday, (b) giving notice to the Inspector, and (c) putting of a notice in the place mentioned in the relevant provisions of the Indian Factories Act, 1911. The relevant charging provision was Section 41(a) read with Section 22 of the 1911 Act. It has been held by the Madras High Court that if even one of the conditions is violated, the offence is complete; but if all the conditions are violated, even then the offence is still only one offence. It has been further held that the employment of four persons would constitute one offence only and not four offences. On going through the decision, it clearly appears that the obligation was with regard to employing of persons on Sunday without following the requirements enumerated in Section 22 of the Indian Factories Act, 1911, and although the requirements were different, obligation was found to be one. In my opinion, the ratio in the Madras decision would not be applicable to the interpretation of Rule 95 because obligation is not only to provide leave book but it is to provide leave book to each of the workers. The ratio in the Bombay decision would squarely apply in construing Rule 95 (1) of the Rules, bearing in mind the nature of the obligation cast upon the manager of the factory under Rule 95(1) of the Rules.

10. The last of the Rules under consideration in these matters is Rule 110-A of the Rules. On a look at the Rule, following obligations on the part of the manager surface:

"(i) supplying or identity cards to the workers and to enter the serial number of such card against the name of such worker in the register of workers maintained u/s 62 read with Rule 88 and a register of child workers maintained u/s 73 read with Rule 93.

(ii) supplying of identity cards to each of the workers free of cost."

If the first obligation is violated, it would be a distinct offence, obligation being one composite obligation and contravention being general in nature. If the second obligation is violated, the offences would be distinct according to the number of workers, who are not supplied with the identity cards. In so far as the cases in hand are concerned, the visit of the complainant indicates that there is a general violation of not supplying identity cards. It is not the prosecution case that some of the workers were supplied identity cards as per the entries in relevant registers, and some were not supplied with the identity cards. What was in substance complained of was general violation of the obligation. The cases have to be viewed from that stand point.

11. Turning then to Section 92 quoted here-inabove, it has to be found that contravention of the provisions of the Act as well as the Rules made thereunder is made punishable and contravention of each separate provision of the Act and each separate provision of the Rules is made punishable. The words "any

contravention" would be referable to the nature of the provisions of the Act or the Rules as stated above. Therefore, the penal provision contained in Section 92 shall have to be read with the provisions of the Act and /or the provisions of the particular Rule alleged to have been violated.

12. It has been submitted by Mr. Keshwani that bearing in mind the provision contained in Article 20 of the Constitution of India, the penal provision should not be construed so as to leave a citizen in double jeopardy in the matter of punishment. Article 20 reads:

" 20. Protection in respect of conviction for offences: (1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself."

13. While dealing with the impact of Article 20, the nature of the legislation shall have to be borne in mind. The legislation in the form of Factories Act, 1948 and the Rules made thereunder is a social legislation and it has certain beneficial objects to attain. Bearing in mind the objects to be attained, the provisions are made requiring different obligations to be performed for the safety and security of the workers. Even Article 20 speaks of violation of law in force and uses the words "any offence". If the law in force prescribed different acts or number of acts to be different offences, then there is no impediment under Article 20 in prosecuting the same person for violation of such different acts under the concerned law in force. In this connection, a decision of this Court in the case of State Vs. Jamnadas Vasanji, may be usefully referred to. In that case, the allegation of the prosecution was that the accused as the manager of the factory did not maintain register of adult workers showing the names of three workers and that a distinct and separate offence u/s 62(a) read with Section 92 of the Act was, therefore, committed by the accused in respect of each of the three workers and three different cases were accordingly tiled against the accused. Now on the face of the provision which was under consideration by this Court, the obligation was one, namely, maintaining of a register of adult workers and showing the names of the workers therein. The learned Magistrate consolidated all the three cases into one and on the accused pleading guilty, passed a single sentence of fine of Rs. 10/- and in default simple imprisonment for seven days. It has been held that it is the failure to maintain a register of adult workers showing the various particulars set out in Section 62 that constitute the offence and a separate and distinct offence is not committed in respect of each particular, which is committed to be shown in the register of adult workers, but it is in

respect of the failure to maintain a register of adult workers. It was, therefore, held that no separate and distinct offences were committed by the accused and that one single offence was justified. It has further been observed that the sentence of fine imposed by the learned Magistrate was unduly lenient. The principle that has been relied upon is, in the words of Gajendragadkar, j., in a judgment delivered on September 3, 1954 in Criminal Revision Application No. 803 of 1954: "In passing of order of sentence for breach of the conditions laid down by the Factories Act, Criminal Courts must bear in mind the beneficent purposes which the provisions of the Act are intended to serve". The fine was, therefore, increased to Rs. 30/- from Rs. 10/- and in default sentence was increased from seven days to ten days.

14. Mr. Shelat, learned A.G.P. has also placed reliance upon a decision in the case of N.K. Chitnis v. State AIR.1953.MB.230 Mr. Keshwani, in reply submitted that u/s 51 no adult worker shall be required to work in a factory for more than 48 hours in a week and what is required u/s 52(1) is that no adult worker shall be required to work in a factory on the first day of the week (Sunday), unless he has or will have a holiday for a whole day on one of the three days immediately before or after the said day. The plain reading of two provisions, submits Mr. Keshwani, would indicate that the obligation cast under the two provisions is an obligation for each of the workers. He, therefore, submitted that the decision in the case N.K. Chitnis (supra) holding that the three sections read together speak of contravention in respect of each worker and not workers generally, and, therefore, the use of the words "in respect of the factory" in Section 92 cannot have the effect of confining it to the cases not of individuals but of factory considered as a unit, will have no application. He sought to distinguish the decision in the case of N.K. Chitnis (supra) by submitting that the nature of the obligation would assume importance in construing the nature of contravention; that is precisely what has been said hereinabove.

15. The result is that while considering whether a contravention of particular rule reflects one offence or of distinct offences worker-wise depends upon the nature of the obligation under the relevant rule or provision of the Act. While applying the penal provisions contained in Section 92 of the Act, nature of contravention under the particular rule or the provision of the Act has to be seen. There may be a rule or provision of the Act which would reveal one distinct offence when the rule or provision is contravened. There may be a rule, or provision of the Act, contravention of which may reveal distinct offences as per the number of workers in respect of whom the contravention or violation, is complained of.

16. Now the objection with regard to the maintainability of these acquittal appeals may be considered. It has been submitted by Mr. Keshwani that on a plain reading of Section 258 of Code of Criminal Procedure, 1973 (II of 1974), these acquittal appeals would not be maintainable. It is admitted position that the proceedings of all these criminal cases have been stopped by the impugned orders before recording of evidence. Thereafter, the stoppage of the proceedings

of all these criminal cases would not amount to acquittal. For the purpose of appreciating the submission of Mr. Keshwani, the provision contained in Section 258 may be quoted. It reads:

" In any summons case instituted otherwise than upon complaint, a Magistrate of the First Class or, with the previous sanction of the Chief Judicial Magistrate, any other Judicial Magistrate, may, for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment and where such stoppage of proceedings is made after the evidence of the principal witnesses has been recorded, pronounce a judgment of acquittal, and in any other case, release the accused, and such release shall have the effect of discharge."

17. The jurisdiction conferred u/s 258 is to stop the proceedings at any stage and the consequence of such stoppage of proceedings appearing in the later part of the provision is twofold. It is acquittal where proceedings are stopped after the evidence of the principal witnesses has been recorded and it is discharge when there is stoppage of proceedings before the evidence is recorded. It is not in dispute that in all these cases no evidence has been recorded and upon a plain reading of the aforesaid provision, the effect of stoppage of proceedings of all these criminal cases is discharge and not acquittal. As a necessary consequence the acquittal appeal would not be maintainable. The appropriate remedy, in my opinion, would be to approach this Court by way of a revision u/s 401 read with Section 397 of the Code. Ordinarily I would have dismissed the acquittal appeals on the technical ground which has been successfully canvassed by Mr. Keshwani. But in the present case the position is quite different inasmuch as the learned Magistrate in all these cases has exercised his jurisdiction not vested in him. This can be seen on a reference to Section 258 of the Code quoted above. All the cases were summons cases instituted upon a complaint in each of the cases and the provision squarely applies to the summons cases instituted otherwise than upon a complaint. This Court had an occasion yesterday, i.e., on February 23, 1994, to decide this point in Criminal Appeal Nos. 611 and 612 of 1988 and Criminal Revision Application No. 155 of 1989. Therefore, the impugned orders are apparently void being outside the jurisdiction of the learned Magistrate. If that is so, it is always open to the prosecution to seek the remedy of revision u/s 397 read with Section 401 of the Code. In all these cases records have already been called for and in view of the aforesaid finding, there is no reason why all these acquittal appeals be not treated as Revision Applications. But, then, to this, Mr. Keshwani vehemently submitted that the nature of the impugned orders is interlocutory and, therefore, these acquittal appeals can neither be treated as Revision Applications nor be entertained as such by virtue of Sub-section (2) of Section 397 of the Code. In support of his submission, he made reference to the following decisions:

18. One is the decision of the Karnataka High Court in the case of *The State of Karnataka Vs. Durgappa*, . The provision which was for consideration by Karnataka High Court was Section 259 of Code of Criminal Procedure, 1898 read

with Section 403 thereof. Section 258 corresponds to Section 249 of 1898 Code, but following changes have been noted in "Sarkar on Criminal Procedure, 6th Edition 1990, at page 742:

" (1) The word "summons" has been added and the words " a Presidency Magistrate" and " complaint" have been omitted.

(2) The words " Chief Judicial Magistrate, any other Judicial Magistrate" and other italicised words have been substituted for "District Magistrate, and other Magistrate" and "either of acquittal or conviction and may thereupon release the accused" respectively."

19. While considering the decision in the case of Durgappa (supra), of the Karnataka High Court the aforesaid changes shall have to be borne in mind. It has been held by the Karnataka High Court that the stopping of proceedings u/s 249 of the Code can never be regarded as an acquittal for the purpose of Section 403, and order u/s 249 merely stops the proceedings without proceeding to pronounce judgment either acquitting or convicting the accused. When the proceedings are stopped u/s 249 the Magistrate has also power to revive proceedings so stopped. However, that power is discretionary power taking into consideration of the relevant circumstances, in my opinion, this decision would not be applicable so as to support the submission of Mr. Keshwani that the impugned order is interlocutory in nature on the reasoning that the proceedings can be revived. The provision as it stands now clearly indicates the consequences of stoppage of proceedings u/s 258 of the Code. As stated above, such consequences introduced in the new Code ear-mark the distinction between the old provision and new provision. Even the Calcutta decision in the case of R.N. Ghosh Vs. The State, . referred to by Mr. Keshwani would not be applicable for the same reason. In fact, the legal consequence of an order made u/s 249 (of the old Code) has been stated in para 11 of the citation by the Calcutta High Court. It has been observed:

" The legal effect of an order made u/s 249 is merely stoppage of proceedings and "release" of the accused. It is not even discharge."

Mr. Keshwani, however, made an effort to substantiate his submission by making a reference to Section 300(5) of the Code which has been introduced in the new Code. That provision reads:

"A person discharged u/s 258 shall not be tried again for the same offence except with the consent of the Court by which he was discharged or of any other Court to which the first mentioned Court is subordinate."

20. In my opinion, the introduction of the aforesaid provision in new Code would further fortify the conclusion that the order made u/s 258 is not interlocutory in nature, but is final in nature. It is submitted that u/s 258 of the Code itself there is a power in the magistrate to revive the proceedings as laid down by the Calcutta and Karnataka High Courts in the aforesaid decisions and Sub-section

(5) of Section 300 provides an additional safeguard in favour of the prosecution for trying an accused who has been discharged u/s 258, of course with the consent of the Court by which the accused was discharged or the Court to which the first mentioned Court is sub-ordinate. I am unable to accept this submission for, as stated above, on account of the earmarked change in the provision contained u/s 258 of the Code, there is no question of revival of proceedings except to file fresh complaint as permitted by Sub-section (5) of Section 300 of the Code. In any case, in my opinion, the order of stoppage of proceedings u/s 258 of the Code can by no stretch of imagination be said to be interlocutory. If the consequence is acquittal, the remedy would be an appeal against such an order by virtue of Section 378 of the Code and if the consequence is discharge, then the remedy would be obviously revision u/s 397 of the Code. Mr. Keshwani finally tried to make good his submission by making a reference to the decision of the Hon''ble Supreme Court in the case of Amar Nath and Others Vs. State of Haryana and Another, . There the term "interlocutory order" u/s 397(2) of the Code has been considered. Reference to head-note (B) will make clear what the Supreme Court said about interlocutory order. The head-note reads:

"The term "interlocutory order" in Section 397(2) has been used in a restricted sense and not in any broad or artistic sense. It merely denotes orders of a purely interim or temporary nature which do not decide or touch the important rights or the liabilities of the parties. Any order which substantially affects the rights of the accused or decides certain rights of the parties cannot be said to be an interlocutory order so as to bar a revision to the High Court against that order, because that would be against the very object which formed the basis for insertion this particular provision in Section 397. Thus, for instance, orders summoning witnesses, adjourning cases, passing orders for bail, calling for reports and such other steps in aid of the pending proceeding, may no doubt amount to interlocutory orders against which no revision would lie u/s 397(2). But orders which are matters of moment and which affect or adjudicate the rights of the accused or a particular aspect of the trial cannot be said to be interlocutory order so as to be outside the purview of the revisional jurisdiction of the High Court."

21. In my opinion, the consequence of the order of stoppage of proceedings by virtue of Section 258 of the new Code would fall under later part of the ratio noted hereinabove from head-note (B). Applying the later part of the test, the Supreme Court held that order passed by the learned Magistrate in that case for issuance of summons in view of the fact that his earlier order dismissing the complaint was reversed by the Sessions Court, could not be said to be interlocutory order, in so far as the stoppage of proceedings are concerned, bearing in mind the newly introduced consequence of such a stoppage at two different stages, in my opinion, it would not amount to an interlocutory order. Hence, submission in this respect made by Mr. Keshwani cannot be accepted.

22. Rest of the Judgment not printed because of its being not important for

Reports.