**BOMBAY HIGH COURT**

State

Vs

A.H. Bhiwandiwalla

(T Gajendragadkar and Shah, J.)

13.09.1954

**JUDGMENT**

**T Gajendragadkar, J.**

1. These two appeals arise from orders of acquittal passed by the learned Chief Presidency Magistrate in favor of the respondent. In both the cases the respondent was charged under Section 92 of the Factories Act (Act LXIII of 1948). The respondent is the occupier of Wadia Mahal Salt Works, which, according to the prosecution case, is a factory as defined under Section 2(m) of the Factories Act. This factory is situated near Koliwada, Sion, Bombay 22.In the case from which Criminal Appeal No. 761 of 1954 arises, the charge against the respondent was that, before occupying or using tile said premises as a factory, he had failed to submit to the Chief Inspector of Factories, Bombay State, a written notice of occupation in Form No. 3 as required under Section 7(1) of the Factories Act and the rules made thereunder. In the companion case from which Criminal Appeal No. 762 of 1954 arises, the charge was that the respondent had failed to submit to the Chief Inspector of Factories an application in Form No. 2 for registration of the factory and grant of license as required under Section 6 of the Factories Act read with Rule 4 of the Bombay Factories Rules, 1950.It appears that the learned Chief Presidency Magistrate was about to take the pleas of the respondent to the two charges framed against him, when it was brought to his notice by the accused that one of his pleas was that the prosecution in both the cases was barred by limitation under the provisions of Section 106 of the Factories Act. The learned Chief Presidency Magistrate was disposed to accept this plea and so he has held in both the cases that the prosecution is barred by limitation.- In the result, he has acquitted the respondent of the offences charged. That is how the only question which arises before us in these two appeals is whether the learned Chief Presidency Magistrate was right in coming to the conclusion that the prosecution against the respondent in both the cases was barred by limitation.

2. Before dealing with this question, it would be convenient to refer to some more facts. In the complaint which has been filed against the respondent by the Inspector of Factories, it has been

alleged that the complainant had visited the factory on May 23,1953, at about 10 a. m. and he had found that the factory was working. The complainant noticed that the workers shown in the list attached to the complaint were working in the factory and that common salt was being manufactured from sea water by evaporation in the pans. A pump driven by an oil engine of 9 H. P. was also seen to be in use.It is common ground that the Inspector had visited this factory on an earlier occasion on March 10,1952, and on March 14,1952, the occupier had been called upon to comply with the requirements of the Factories Act in respect of this factory. The occupier took no steps to comply with the requisition and it was found on the second visit which the Inspector paid to the factory on May 23,1953, that the factory was working without complying with the requisition which had already been served on the occupier.It would thus be seen that, if the present complaints are held to be in respect of the offence which was discovered by the Inspector on his first visit to the factory on March 10,1952, the prosecution of the respondent would be clearly barred by limitation. On the other hand, if it is held that the failure of the respondent to comply with the requisitions served on him and his conduct in running the factory without complying with the said requisitions constitutes a continuing offence, then the prosecutions would not be barred by limitation.

3. At this stage it would be relevant to consider the material provisions of the Factories Act. This Act came into force on September 23,1948. Section 6 of the Act lays down the procedure in regard to the approval, licensing and registration of factories. By this section the Provincial Government is authorised to make rules in respect of the matters set out in Sub-clauses (a) to (e) of Sub-section (1) of the said section. Rules 3 to 11 have accordingly been framed by the Local Government in that behalf. Rule 3 requires an application for obtaining previous permission for the site on which the factory is to be situated and for the construction or extension of a factory.Form No. 1 prescribes the details which have to be mentioned in the said application. Sub-Rule (2) of Rule 3 provides that, if the Chief Inspector is satisfied that the plans are in consonance with the requirements of the Act, he shall, subject to such conditions as he may specify, approve them by signing and returning to the applicant one copy of each plan; it would also be open to the Chief Inspector to call for further particulars before granting his approval.Rule 4 then provides for the application for registration and grant of license. In the present appeals we are concerned with the provisions of this rule. According to this rule, the occupier at every factory, whether in existence at the date of the commencement of the Act or coming within the scope of the Act, after its commencement shall submit to the Chief Inspector an application to Form No. 2 for the registration of the factory and grant of a license; and the application shall be accompanied by the notice ot occupation in form No. 3, in triplicate, prescribed under Section 7, provided that the occupier of premises to use as a factory on the date of the commencement of the Act shall submit such application within 30 days from the date of

the commencement of the rules.Section 7 of the Act provides that the occupier shall, at least 15 days before he begins to occupy or use any premises as a factory, send to the Chief Inspector a written notice setting out the details mentioned in the said section. It would thus be noticed that, whereas in regard to a factory which would be established after the commencement of the Act the occupier is required to give a notice to the Inspector at least 15 days before he begins to occupy or use the premises in question as a factory, the Legislature knew that many factories were in existence before the commencement of the Act and so in respect of these factories Rule 4 provides a period of 30 days from the date of commencement of the rules within which the requisite notice has to be given by the occupiers of such factories.It is common ground that in the present case no such notice has been given in Form No. 2 or in Form No. 3 and no license has been applied for or obtained in respect of the factory in question. Rule 5 then provides for the grant of license; Rule 6 lays down the manner in which the license can be amended; Rule 7 deals with the renewal of license; and Rule 8 deals with the transfer of license. Rule 9 lays down the procedure to be followed in case the licensee dies or becomes insolvent. Cases of loss of license are dealt with in Rule 10, while Rule 11 deals with the payment of fees. Rule 12 lays down that the notice of occupation shall be made in Form No. 3.

4. The case for the prosecution in Criminal Appeal No. 761 of 1934 is that the respondent had failed to submit to the Chief Inspector a written notice of occupation in Form No. 3 as required under Rule 7 (1) and the rules made thereunder. This means that the charge against the respondent is that he did not give notice in the said prescribed form within 30 days from the date of commencement of the rules. This charge does not refer to the working of the factory without obtaining a license, it is confined to the occupation of the factory in respect of which the respondent was under an obligation to give a notice within 30 days from the date of commencement of the rule.The charge in Criminal Appeal No. 762 of 1954 is wider: it refers to the failure of the respondent to submit to the Chief Inspector an application in Form No. 2 for registration and it also refers to his failure to obtain a license as required under Section 6 read with Rule 4 of the Bombay Factories Rules. This charge, therefore, is based on two acts of the respondent: his failure to apply for registration and his conduct in running the factory without obtaining a license.The learned Chief Presidency Magistrate has held that, -in respect of the charges in both the cases, the provisions of Section 106 of the Factories Act come into operation and the effect of these provisions is that the prosecution must be held to be barred by limitation. The penal section in the Act is Section 92. It provides that, save as is 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 any of the provisions of this Act or of any rule made thereunder of any order in writing given thereunder, the occupier and manager of the factory shall each be guilty of an offence and punishable in a manner prescribed by this section.Section 106 provides

that 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. There is a proviso to this section which deals with the offence of disobeying a written order made by an Inspector; but we are not concerned with this proviso in the present appeals.

5. Now, the question which fails to be considered in the present appeals is whether it can be said that more than three months have elapsed after the alleged commission of the offence came to the knowledge of the Inspector in these two appeals. The answer to this question would depend upon whether or not the offence alleged is what is often described as a continuing offence. If the offence alleged against the respondent is and can be committed only once, then the provisions of Section 106 would assist his plea of limitation. On the other hand, if the offence alleged against him is of such a character that it is committed by him from day to day, then the plea of limitation cannot succeed.In civil law, we often refer to a continuing or recurring cause of action. Similarly, even in criminal law the expression "continuing offence" is frequently used. As observed by Beaumont C. J. in - 'Emperor v. Chhotalal Amarchand', AIR 1937 Bom 1 (FB) (A) the expression "continuing offence" is not a very happy expression. It assumes, says the learned Chief Justice, (pp. 6, 7) "..... that you can have a continuing offence in the sense in which you can have a continuing tort, or a continuing breach of contract, and I doubt, myself whether the assumption is well founded, having regard to the provisions of the Criminal Procedure Code as to the framing of charges and as to the charges which can be tried at one and the same trial. It is quite clear that you could not charge a man with committing an offence 'de die in diem' over a substantial period."Even so, this expression has acquired a well-recognised meaning in criminal law. If an act committed by an accused person constitutes an offence and if that act continues from day to day, then from day to day a fresh offence is committed by the accused so long as the act continues. Normally and in the ordinary course an offence is committed only once. But we may have offences which can be committed from day to day and it is offences falling in this latter category that are described as continuing offences.Confining ourselves to the offences charged against the respondent in the present two appeals, it is clear that the offence committed by him by reason of his failure to apply for the registration of his factory cannot be said to be a continuing offence. The factory was working even before the commencement of the Act and under Rule 4 it was obligatory on him to have applied for the registration of the factory in Form No. 2 and to have given notice of occupation in Form No. 3 within 30 days from the date of commencement of the rules. The failure of the respondent to comply with these requirements makes the establishment of the factory and its occupation by him subsequent to the lapse of 30 days alter tne commencement of the rules irregular and unlawful. But it would be difficult to hold that the said establishment and occupation 'per se' would constitute a continuing offence.The

position with regard to the requirement of the grant of a license is, however, substantially different. The grant of a license which is issued in Form No. 4 prescribed under Rule 5 authorises the occupier to use the premises mentioned in the license as a factory employing the number of workers as specified and using motive power as indicated in the license subject to the provisions of the Factories Act and the rules made thereunder. If the respondent did not apply for a license and has been using the premises as a factory without a license, his conduct clearly amounts to a continuing offence, and in respect of a continuing offence it would be impossible to uphold the plea of limitation raised tinder Section 106 of the Act.A continuing offence, as I have just indicated, is an offence which is committed from day to day, arid if that be so, the complaint filed against the respondent in Criminal Appeal No. 762 of 1954, inasmuch as he has been using the premises as a factory without obtaining a license, cannot be dismissed as barred by limitation because the coin-mission Of the offence took place on May 23, 1953, and the complaint has been filed on July 13, 1953. It is perfectly true that the offence of using the premises as a factory without a license was committed by the respondent for several days before May 23, 1953.But the present complaint is not in respect of the earlier offences and so it would be no answer to the present complaint to say that the accused might have been prosecuted earlier and so the present complaint should be rejected as barred by limitation. Every day that the respondent used the premises as a factory without obtaining a license, he was committing a fresh offence, and in respect of each fresh offence a separate prosecution is competent. The failure of the complainant to prosecute the respondent for the earlier offences committed by him cannot, in our opinion, justify the application of the provisions of Section 106 in support of his plea of limitation.

6. It has been urged before us by Mr. Khandala-wala that Rule 4 of the Factories Rules does not expressly make the use of the premises as a factory without a license a continuing offence. In fact, he suggested that the failure to obtain a license cannot be said to have been made penal under Section 92 of the Act read with Rule 4 of the Factories Rules.In this connection, Mr. Khandalawala referred us to the corresponding provisions of the English Act. Section 113 of the English Factories Act of 1937, which deals with a notice of occupation of a factory and use of mechanical power, expressly provides that if there is failure to comply with the provisions of Section 113, the defaulter shall be guilty of an offence and liable on conviction thereof to a certain fine for each day since the expira tion of the month mentioned In the section. Section 140, Sub-sectoion (5), of that Act, has also been pressed into service by Mr. Khandalawala.This sub-section provides that, where any offence is committed under the Act by reason ot a failure to make an examination, enter a report or do any other thing at or within a time specified by this Act or any regulation or order made thereunder, the offence shall be deemed to continue until the examination is made, or the report entered, or the other thing done, as the case may be. Mr. Khandalawala says that, where the Legislature wants to make a continuing default on the part of

an occupier of a factory a continuing offence liable to punishment, the Legislature adopts proper phraseology and makes adequate provisions in that behalf.The Indian Factories Act, says Mr. Khandalawala, has not made adequate provisions, nor has it adopted appropriate phraseology to Justify the conclusion that the conduct of the respondent in using the premises as a factory amounts to a continuing offence. Mr. Khandalawala has also invited our attention to somewhat similar provisions contained in Section 390 of the City of Bombay Municipal Act (Act III of 1888). Sub-section (1) of Section 390 lays down that no person shall newly establish in any premises any factory, workshop or work-place in which it is intended that steam, Water or other mechanical power shall be employed, without the previous written permission of the Commissioner, nor shall any person work or allow to be worekd any such factory, workshop or workplace without any such permission.Mr. Khandalawala contends that the two parts of Sub-secton (1) of Section 390 impose two specific different prohibitions in respect of a factory: the first part prohibits the establishment of the factory and the second part prohibits the working of the said factory. On the other hand, Rule 4 does not clearly and specifically lay down any such prohibitions. It may be conceded that Rule 4 is not very happily worded. It could and might have made its object more clear by following the pattern laid down in the corresponding provisions of the English statute or the provisions of Section 390 of Bombay Act 3 of 1888 to which we have just referred.

But we entertain no doubt whatever about the object which Rule 4 has in view. It is clear that, in the case of factories which were already in existence, Rule 4 requires that within the period specified the occupier must apply for the registration of the said factories and must obtain a license for using the premises in question as a factory. The importance of obtaining a license for the running of the factory can hardly be exaggerated. The license is granted for a stated period. It is to be renewed after the expiry of the said period. The procedure prescribed has to be followed if an amendment is sought for in the license.Even for the transfer of a license, an application has to be made and permission obtained, and in the case of death or insolvency of the licensee the person carrying on the business of such license is required to make an application for amendment of the license under Section 6 under his own name within a reasonable time. Indeed, the registration of the factory and the grant of a license for run ning it are in a sense the most important, if not the crucial, provisions of the Factories Act. The competent authorities empowered under this Act can supervise the working of the factories only after the factories are registered and licenses obtained by the occupiers of the factories for running them.In our opinion, it would be impossible to accede to the argument that the failure to comply with requirements of such paramount importance is not intended to be punished within the meaning of Section 92 of the Act. Even if the words used in Rule 4 may, and can, be improved upon, the object of the provision is clear, and in construing the words used in Rule 4 it would be open to us to bear in

mind this object. In regard to remedial and beneficent (legislation like the Factories Act, what is sometimes described as the equitable construction of the statute is permissible and it would be our duty to adopt such construction of the statute as shall suppress the mischief and advance the remedy.

7. We must, therefore, hold that the failure to apply for the registration of the factory as well as the failure to apply for the grant of a license are punishable within the meaning of Section 92 of the Factories Act. In regard to the first default, however, it may not be possible to hold that the conduct of the defaulter constitutes a continuing offence. In regard to the latter default, we feel no hesitation in holding that his conduct in using the premises from day to day without obtaining a license is a continuing offence. Every time the premises are thus used as a factory, a fresh offence is committed, and no bar of limitation can, therefore, be pleaded against this charge.

8. The question of limitation in reference to the commission of continuing offences has often enough been considered by this Court, and except for the decision in -- *'Bechardas v. Emperor*[1]*;* the consensus of judicial opinion in this Court has been in favour of the view which we are disposed to take. We would, therefore, refer very briefly to the reported decisions on this point.In 'Bechardas' case (B)', Mirza and Broom-field JJ. were dealing with the provisions of Section 123 (7) or Section 118(4) of the Bombay City Municipalities Act (18 of 1925). The learned Judges held that failure to remove a building in respect of which a person has been convicted under the said provisions is not a 'continuing contravention' within the meaning of those sections. Dealing with the question of limitation, both the learned Judges took the view that limitation for a prosecution for a continuing offence runs from the time when the offence is first committed, or, where the offence consists in failure to remove the building after conviction, from the date of the conviction.This view has, however, been emphatically dissented from by Beaumont C. J. and Wassoodew J. in - *'Emperor v. Karsandas Govindji'*[2]*, In* this case, the learned Judges were called upon to consider the effect of the provisions of Section 390, Sub-section (1), of the City of Bombay Municipal Act (Act 3 of 1888). They held that the establishing of a factory without permission is an offence committed once and for all when the factory is established, but that the working of a factory without permission is an offence which arises on every day on which the factory is so worked. That is why in their opinion Section 514, which prescribed a limitation for prosecutions under the Act, can be no bar to a charge in respect of working the factory without permission.In his judgment, Beaumont C. J. referred to the fact that the headnote in 'Bechardas v. Emperor (B)' seemed to lay down that limitation for a prosecution fora continuing offence runs from the time when the offence is first committed, & he added that, if the expression "the oflence is first committed" refers to the date when the act constituting the offence first took place, the statement is obviously wrong because it would abolish altogether the distinction which has been recognised over and over again between an act which constitutes an offence once and for all and

an act which continues and therefore constitutes a fresh offence on every day on which it continues.In-- *'State v. Babu Gulam Mahomed'[3],* (D) Rajadhyaksha and Dixit JJ. took the same view about the nature of a continuing offence and the plea of limitation which may be raised in respect of it. A similar view has been taken by Bhagwati and Vyas JJ. in - 'State of Bombay v. Devraj Tulsi', . In this case, eight accused were tenants of a certain building, against the owner of which the Municipality had issued a notice of requisition under Section 354 of the City of Bombay Municipal Act (Act 3 of 1888) calling upon him to remove the structure which was in a dilapidated condition.The tenants refused to hand over possession of the premises to the landlord and so the landlord had to approach the chief Judge of the Court of Small Causes for the requisite order under Section 507 of the Act. An order was accordingly issued by the Chief Judge on March 16, 1950, directing each one of the eight tenants to hand over to the landlord vacant possession of the premises on or before April 16, 1950. The tenants refused to comply with this order and the Municipality thereupon prosecuted the eight tenants in respect of the offence alleged to have been committed by them on July 12, 1950.The plea of limitation raised by the tenants under the provisions of Section 514 (c) of the Act was rejected by this Court. It was urged before Bhagwati and Vyas JJ. that the view taken by Rajadhyaksha and Dixit JJ. in the unreported decision referred to above may have to be reconsidered and so a plea was made that the question be referred to a full bench. The learned Judges considered the merits of the contention and came to the conclusion that the view taken by Rajadhyaksha and Dixit JJ., with respect, was right and so it was unnecessary to refer the matter to a Full Bench. In dealing with the character of a continuing offence, Mr. Justice Bhagwati observed (p. 149) ".....it is a misnomer to say that fresh offences are committed at each period of time when particularly the non-compliance of the order which constitutes the offence is the omission to do an act which has been ordered to be done".The learned Judge took the view that, where a positive act is ordered to be done, a case or cases may arise where by reason of the breach of the terms of the order you might have commission of a series of offences from day to day. With respect, the distinction which these observations seems to bring out between a default which con-sists of an omission to do an act and a default which consists in failure to comply with a direction to do a positive act may not be very helpful in determining the character of a continuing offence.If the test laid down by the learned Judge were literally applied to the conduct of the accused persons in 'Devraj's case (E)', it would perhaps be open to suggest that the charge against the accused persons was that they had omitted to vacate the premises and in that sense their conduct was no more than omission technically so-called. Similarly, even where a positive act is ordered to be done and it is not done, the conduct of the defaulter may well be described as nothing more than omission to do the Act.Take the case of the factory with which we are concerned in the present appeals. From one point of view, the default of the respondent consists in his failure to apply for a license and this default may well be described as omission on his part to apply for a license. There is,

however, a positive aspect of the matter and that is that the respondent was running the factory from day to day without obtaining a license.In our opinion, in every case of a continuing offence it may be possible to describe the default as amounting to an omission or to a positive act on the part of the defaulter. That is why, with very great respect, we feel some doubt as to whether the distinction between omission and positive act, on which some emphasis has been laid by Bhagwati J., can be said to be decisive of the character of the offence. Besides, as Mr. Justice Bhagwati himself has fairly pointed out, the distinction which he was seeking to draw is inconsistent with the view expressed by Beaumont C. J. in 'Gursondas' case (C);

9. There is one more decision to which reference must be made. In -- 'Public Prosecutor v. Veerabadrappa', , Menon and Mack JJ. have held that failure to comply with the provisions of Section 14 of the Factories Act is a continuing offence. In respect of such an offence, the learned Judges took the view that, where an Inspector of Factories notices such failure and brings it to the notice of the owner of the factory but on a subsequent visit the Inspector finds that the defect had not been rectified, prosecution-can be launched within three months from the date of the subsequent visit, and that Section 106 of the Act does not mean that the prosecution must be launched within three months from the date of the first visit in the case of continuing offences. With respect, we agree with this view.

10. We must, therefore, hold that the charge in the case from which Criminal Appeal No. 761 of 1954 arises is barred by limitation. In the result, this appeal fails and must be dismissed. The first part of the charge in the case from which Criminal Appeal No. 762 of 1954 arises is also barred by limitation, but the second part of the charge which relates to the use of the premises in question by the respondent as a factory without obtaining a license is not barred by limitation under Section 106.

This appeal would, therefore, be allowed and the case sent back to the learned Chief Presidency Magistrate with the direction that he should deal with the second charge in accordance with law.

11. Order accordingly.

Cases Referred.

1AIR 1930 Bom 340 (B)
2AIR 1942 Bom 326 (C)
3Cri. Revn. Appln. No. 114 of 1951, D/- 4-4-1951 (Bom)