STATE OF GUJARAT

v.

JETHALAL CHELABHAI PATEL

1963

December 6

(A.K. SARKAR AND K.N. WANCHOO, JJ.)

Factories Act, 1948 (63 *of* 1948), *ss.* 21(1)(*iv*)(*c*), 92, 101—*Dangerous Machine—Inquiry—Absence of fence—Removal by somebody else, if good defence.*

While greasing the spur gear wheel of an oil mill, one of the hands of a workman got caught and had to be amputated. It appeared that at the time of the accident the cover of the spur gear wheel was not there. The respondent, who is the manager of the mill was prosecuted under s. 92 of the Factories Act for having failed to comply with s. 21(1) (iv) (c) of the Act. The workman said that the cover had been removed by the respondent for repairs, while the case of the respondent was that the workman had himself removed it. The trial Judge was unable to accept either version and he acquitted the respondent observing that he could not be held liable if the cover was removed by someone, without his consent or knowledge. On appeal, the High Court affirmed the acquittal.

Held: (*i*) The mere fact that someone else had removed the safeguard without the knowledge, consent or connivance of the occupier or manager does not provide a defence to him. When the statute says that it will be his duty to keep a guard in position while the machine is working and when it appears that he has not done so, it will be for him to establish that notwithstanding this he was not liable.

(*ii*) Even where the occupier or manager could establish that somebody else had removed the fence, he has further to prove that he exercised due diligence to see that the fence, which under the Act was his duty to see was kept in position all along, had not been removed.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 193 of 1961.

Appeal by special leave from the judgment and order dated February 9 and 10, 1961, of the Gujarat High Court in Criminal Appeal No. 367 of 1960.

D.R. Prem, K.L. Hathi and *R.H. Dhebar*, for the appellant.

The respondent did not appear.

December 6, 1963. The Judgment of the Court was delivered by

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Sarkar J.

SARKAR J.—This appeal raises a question under the Factories Act, 1948. It was unfortunate that there was no appearance on behalf of the respondent but Mr. Prem appearing in support of the appeal has placed the matter very fairly before us with all the relevant reported decisions from the point of view of both the appellant and the respondent. We are much beholden to him for this assistance.

The respondent is the Manager of an oil mill. The mill had a spur gear wheel. A workman of the mill while greasing the spur gear wheel which was then in motion had one of his hands caught in it. Eventually that hand had to be amputated. It appeared that the spur gear wheel had a cover which had bolts for fixing it to the base but at the time of the accident the cover was not there, having apparently been removed earlier. There is no evidence to show when it was last in position.

The respondent was prosecuted under s. 92 of the Act for having failed to comply with s. 21(1) (iv) (c). The relevant part of this section is as follows:

> S. 21. (1) In every factory the following namely,—
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> .....
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> .....
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> (*iv*) unless they are in such position or of such construction as to be safe to every person employed in the factory as they would be if they were securely fenced, the following, namely—
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> .....
>
> (*c*) every dangerous part of any other machinery,
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> shall be securely fenced by safeguards of substantial construction which shall be kept in position while the parts of machinery they are fencing are in motion or in use:

Section 92 of the Act provides as follows:

S. 92. Save as is otherwise expressly provided in this Act.....if in, or in respect of, any factory there is any contravention of any of the provisions of this Act.....the occupier or manager of the factory shall be guilty of an offence and punishable with imprisonment....., or with fine.....

There is no dispute that a guard had been put over the spur gear wheel and it was a proper guard. It is not contended that if it had been there, then the respondent could be said to have committed any offence, but it was not there. The workman said that it had been removed by the respondent for repairs while the case of the respondent was that the workman had himself removed it. The learned trial Judge was unable to accept either version and he acquitted the respondent observing that he could not be held liable if the cover was removed by someone without his consent or knowledge.

The learned Judges of the High Court when the matter came to them in appeal, referred to a very large number of cases, mostly of the English Courts under the English Factories Act and a few of our High Courts and from them they deduced the two following principles: (1) Though the obligation to safeguard is absolute under s. 21(1)(iv)(c) of the Indian Act, yet it is qualified by the test of foreseeability, and (2) If the safeguard provided by the employer or manager is rendered nugatory by an unreasonable or perverted act on the part of the workman, there is no liability of the employer or manager. With great respect to the learned Judges of the High Court we are unable to appreciate the relevancy of these two principles to the decision of the case in hand. Nor does it seem to us that the learned Judges of the High Court rested their judgment on any of these principles. We, therefore, think it unnecessary to notice the cases mentioned in the judgment of the High Court or discuss the principles to be deduced from them.

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As the High Court stated, there is no dispute that the spur gear wheel was a dangerous machine within the meaning of s. 21(1)(iv)(c). That being so, clearly, there was an obligation to securely fence it and to see that the fence was "kept in position while the parts of machinery they are fencing are in motion or in use". Indeed the fact that the respondent had provided the guard over the machine puts it beyond doubt, as the High Court observed, that the machine was dangerous within the meaning of the section. It was not contended that the risk from the unguarded machine was not a foreseeable risk. No question of the risk not being foreseeable, therefore, arises in this case nor is this put up by way of a defence.

The High Court proceeded on the assumption that it had not been proved that the workman had himself removed the guard. We will also proceed on that assumption. The High Court held that in a criminal case an accused was not bound to offer any explanation and if he did and that explanation was not established, that would not justify his conviction for the offence with which he was charged. This is a proposition which it is unnecessary to dispute in the present case. The High Court then observed that s. 21(1)(iv)(c) of the Act contemplated a default and that default had to be established by the prosecution. It lastly said that there was nothing in the Act to indicate that the legislature intended that an occupier or manager must always be on the look out to bring to book every offender who removed the safeguard furnished by him or that a failure on his part to do so must entail his conviction. It also observed that the statute did not require that where the occupier or manager had carried out his obligation under the section by providing a proper safeguard, he would be liable if someone else, not known to him, removed it without his knowledge, consent or connivance. It, therefore, held that as in the present case it could not be said that either he or the workman had removed the guard, it followed that someone whom the occupier or the manager could not fix

upon had removed it and that was something which the occupier or manager could not reasonably be expected to anticipate and he could not be made liable for such removal.

We are unable to accept this view of the matter. No doubt the default on the part of the person accused has to be established by the prosecution before there can be a conviction. It has to be observed that s. 21 (1)(iv)(c) requires not only that the dangerous part of a machine shall be securely fenced by safeguards but also that the safeguards "shall be kept in position while the parts of the machinery they are fencing are in motion or in use". We should have thought that the words "shall be securely fenced" suggest that the fencing should always be there. The statute has however put the matter beyond doubt by expressly saying that the fencing shall be kept in position while the machine is working. That is the default that has happened here; the fencing was not there when the machine had been made to work. This is an admitted fact and no question of establishing it arises.

Does the mere fact that someone else had removed the safeguard without the knowledge, consent of connivance of the occupier or manager always provide a defence to him? We do not think so. When the statute says that it will be his duty to keep the guard in position when the machine is working and when it appears that he has not done so, it will be for him to establish that notwithstanding this he was not liable. It is not necessary for us to say that in every case where it is proved that the manager or occupier had provided the necessary fence or guard but at a particular moment it appeared that the fence or guard had been removed, he must be held liable. Suppose the fence for some reason for which the manager or occupier is not responsible, suddenly breaks down and the machine remains unfenced for sometime before the owner or occupier found that out and replaced the fence. It may be that in such a case he cannot be made liable. A statute does

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not, of course, require an impossibility of a person. But there is nothing to show that that is the case here. The respondent has given no evidence whatever to show what he had done to carry out his duty to see that the guard was kept in position when the machine was working. The onus to prove that was on him because his defence depended on it. He has completely failed to discharge that onus. We, therefore, think that he is liable under s. 92 of the Act for having failed to carry out the terms of s. 21(1)(iv).

Section 101 of the Act was referred to as supporting the contention that the liability of an occupier or manager for failure to observe the terms of the Act was absolute and the only defence available to him was that provided by it. In our view, it is unnecessary to deal with that question. It does not arise in the present case, for we find that the respondent had offered no defence whatever, whether under s. 101 or otherwise. His only point was that he did not know what happened to the guard and that, in our opinion, is no defence at all.

We wish, however, to refer to the section for another purpose. The section states that where an occupier or manager of a factory is charged with an offence punishable under this Act, he shall be entitled to have any other person whom he charges as the actual offender brought before the Court and if he proves to the satisfaction of the Court (a) that he used due diligence to enforce the execution of the Act, and (b) that the said other person committed the offence in question without his knowledge, consent or connivance, then that other person shall be convicted of the offence and the occupier or the manager shall be discharged. It will appear, therefore, that even where the occupier or manager proves that somebody else has removed the fencing without his knowledge, consent or connivance, that alone would not exempt him from liability but he has further to prove that he had used due diligence to enforce the execution of the Act which can only mean, in a case like the present, that he exercised due diligence

to see that the fence which under the Act it was his duty to see was kept in position all along had not been removed. It seems to us clear that if it was his duty to exercise due diligence for the purpose in a case where he could establish that somebody else had removed the fence, it would be equally his duty to exercise that diligence where he could not prove who had removed it. If it were not so, the intention of the Act to give protection to workmen would be wholly defeated.

For these reasons we are unable to agree with the view of the High Court or the learned trial magistrate. Accordingly we allow the appeal and set aside the judgment of the Courts below and convict the respondent under s. 92 for contravening the terms of s. 21(1)(iv)(c). We impose on him a fine of Rs. 200. In default he shall undergo one week's simple imprisonment.

Appeal allowed.

SULTAN BROTHERS (P) LTD.

v.

COMMISSIONER OF INCOME-TAX

(B.P. SINHA, C.J., A.K. SARKAR, M. HIDAYATULLAH, K.C. DAS GUPTA AND N. RAJAGOPALA AYYANGAR JJ.)

Income Tax—Assessment—Letting of building and furniture—Such letting, if business—Income Tax Act, 1922 (11 *of* 1922), *ss.* 10, 12(4).

The appellant assessee let out a building fully equipped and furnished, for a term of six years for running a hotel and for certain ancillary purposes. The lease provided for a rent for the building and a hire for the furniture and fixtures. In the assessment of the income under the lease to income-tax,

Held: Whether a particular letting is business has to be decided in the circumstances of each case. It would not be the doing