2. The short facts are : The preliminary notification under Sec. 4(1) of the Act was made on July 26, 1963. On January 16/18, 1969, the declaration under Sec. 6 was duly notified. On January 17, 1972, a writ petition was filed in the High Court challenging the declaration. The High Court took notice of the Land Acquisition (Amendment and Validation) Act, 1967 but relying upon a Division Bench judgment of the same High Court in *Valji Mulji v. State,* 1970 GLR 95 held that the period of 5½ years from the date of the preliminary notification was unreasonable delay for making of the declaration under Sec. 6 of the Act.

3. The validation provision came into force on January 20, 1967. Two judgments of this Court dealing with this aspect being *Gujarat State Transport Corporation v. Valji Mulji Soneji,* 1979 (3) SCC 202 and *State of Gujarat v. Punjabhai Nathubhai,* 1988 (2) SCC 478 : 1988 (2) GLR 1241 (SC) have now concluded the position with reference to the provisions of the Validation Act and on the ratio of these judgments the decision of the Gujarat High Court on which reliance was placed by the High Court in disposing of these matters cannot be sustained. We accordingly allow the appeals, set aside the decision of the High Court and sustain the declaration under Sec. 6 of the Land Acquisition Act dated January 18, 1969.

4. There shall be no order as to costs.

(ATP) *Appeals allowed.*

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CRIMINAL APPELLATE

Before the Hon'ble Mr. Justice R. A. Mehta.

STATE OF GUJARAT v. DHIRAJLAL PRANSHANKAR BHATT*

Constitution of India, 1950 - Art. 20(3) - Criminal Procedure Code, 1973 (II of 1974) - Secs. 250, 256 & 300 - Sec. 256 empowers the Court to dismiss a complaint on the ground of absence of the complainant but this power must be judiciously exercised - Where the complainant is a public servant and he is transferred to another station and he had attended the Court on all the days dismissal was improper - The Code empowers the High Court to set aside the order of acquittal - It is a fallacy to urge that once there is an acquittal by a Magistrate, Art. 20(3) and Sec. 300 of the Code bar a fresh trial.

The learned Counsels for the respondents have submitted that the language of Sec. 256(1) makes it clear that if the complainant does not appear, the Magistrate shall, notwithstanding anything before contained, acquit the accused unless

*Decided on 25-7-1989. Criminal Appeals Nos. 238 to 333 of 1988, whereby the complaints filed by the Factory Inspector were dismissed on the ground of absence of the complainant.

for some reason he thinks it proper to adjourn the hearing of the case to some other day. The record of this case shows that there were nearly 42 dates almost on all occasions, the complainant was present. Rarely the complainant was absent or adjournment was sought. It is seen from the rojnama that on many occasions, the witnesses summons were served and the witnesses were present and yet the matters have been adjourned. In these circumstances, if on one occasion, the complainant who is a public servant was not present, the Court ought to have in exercise of sound judicial discretion, adjourned the hearing. If this power is not exercised in such cases, then this power can rarely be exercised in other cases. (Para 2)

Inspite of 42 dates in the case no evidence was recorded at any stage. The complainant had shown his sufficient interest to proceed with the matter by remaining present on almost all days and getting the witnesses summons issued and keeping the witnesses present. Merely because the Court could not record the evidence because of the reasons not attributable to the complainant, it is not a case where the Magistrate should have proceeded to dispose of such large number of cases in this fashion. The learned Magistrate was totally unjustified in doing so. (Para 4)

The learned Counsel for the accused has submitted that since the accused have been acquitted, they cannot be prosecuted again in view of the provisions of Sec. 300 of the Code of Criminal Procedure and Art. 20(3) of the Constitution of India because that would amount to double jeopardy. It will be the same complaint to be tried. If the contention of the learned Counsel were to be accepted, once there is an acquittal, there cannot be appeal against acquittal and in such appeals against acquittal, High Court cannot pass any order for remand or retrial. The powers of the appellate Court are mentioned in Sec. 386 of the Code of Criminal Procedure under which appellate Court in an appeal from an order of acquittal can reverse such order and direct that further inquiry be made or that the accused be retired or committed for trial or find him guilty and pass sentence on him according to law. In view of this express provisions, there is no difficulty whatsoever and there is no bar in setting aside the order of acquittal and sending the matter for trial in accordance with law. (Para 6)

M. D. Pandya, P. P. for the Appellant-State.
S. I. Nanavati, for the Respondents.
K. S. Nanavati, for the Respondents.

MEHTA, J. The State being aggrieved by mass disposal by acquittal in 96 Criminal Cases has preferred these appeals and contended that the learned Chief Judicial Magistrate has gravely erred in doing so merely because the complainant-Factory Inspector was not present on that day especially when on all previous occasions, he was present and witnesses were, also present on several dates. It is also submitted that the complaint, a public servant was transferred and therefore he had sent a telegram and another person Mr. Parekh was present in the Court on that day.

On behalf of the respondents, learned Counsels have submitted that under Sec. 256 of the Code of Criminal Procedure, the learned Magistrate has the jurisdiction and discretion to pass such an order and the learned Magistrate has given reasons for dismissing the complaint.

Section 256 of the Code of Criminal Procedure reads as under :

"256(1) If the summons has been issued on complainant, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the *complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused* unless for some *reason* he thinks it *proper to adjourn* the hearing of the case to some other day;

Provided that where the complainant is represented by a Pleader or by the Office conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

(2) The provisions of sub-sec. (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death."

2. The learned Counsels for the respondents have submitted that the language of Sec. 256(1) makes it clear that if the complainant does not appear, the Magistrate shall, notwithstanding anything before contained, shall acquit the accused unless for some reasons he thinks it proper to adjourn the hearing of the case to some other day. The record of this case shows that there were mearly 42 dates almost on all occasions, the complainant was present. Rarely the complainant was absent or adjournment was sought. It is seen from the rojnama that on many occasions, the witnesses summons were served and the witnesses were present and yet the matters have been adjourned because of :

(i) strike of lawyers;

(ii) adjournment sought by the accused and,

(iii) Court being busy with other cases.

About four times, because of the absence of the accused, warrants had to be issued. On the day previous to the dismissal of the complaint, the complainant was present and the Advocate for the accused had prayed for adjournment and therefore the Court had directed payment of Rs. 250/- towards the costs of the witnesses. Having regard to this State of record, it appears that the learned Magistrate was unaware of his duty to see that the cases are not disposed for just for the sake of disposal and for the sake of statistics. This is not a case where the complainant has repeatedly sought adjournments for delaying the proceedings. It is true that the criminal cases were filed in the year 1985 and this order of dismissal was passed in the year 1987, but the delay was not at all due to the complainant. In fact the complainant and his witnesses have remained present on so many occasions and due to various reasons as stated above, the matter could not be taken up. In these circumstances, if on one occasion, the complainant who is a public servant was not present, the Court ought to have in exercise of sound judicial discretion, adjourned the hearing. If this power is not exercised in such cases, then this power can rarely be exercised in other cases.

3. In the grounds of appeal, it is mentioned that another officer Mr. Parekh was present on that day. But there is nothing on record

to show that he was present. But there is no dispute that the complainant was not present on that day as he was transferred. It was a good ground and sufficient cause for the complainant to remain absent on that day and the interest of justice required, having regard to the facts of the case as narrated earlier, that the learned Magistrate ought to have adjourned the hearing to some other day.

4. Inspite of 42 dates in the case no evidence was recorded at any stage. The complainant had shown his sufficient interest to proceed with the matter by remaining present on almost all days and getting the witnesses summons issued and keeping the witnesses present. Merely because the Court could not record the evidence because of the reasons not attributable to the complainant, it is not a case where the Magistrate should have proceeded to dispose of such large number of cases in this fashion. The learned Magistrate was totally unjustified in doing so.

5. The learned Magistrate has also issued a direction under Sec. 250 of the Code of Criminal Procedure for issuing a notice for compensation to the accused and the reason given is that the complainant has without giving any evidence for a long time has prolonged the case for a long time by remaining absent and caused physical, mental and economic loss to the accused. In view of the State of record, it cannot be said that the complainant had prolonged or delayed the case or that he had not led the evidence. As seen earlier, the complainant was present almost on all occasions. He had not sought adjournment. He had kept the witnesses present. In view of this, the reason given by the learned Magistrate for issuing the notice is also incorrect. That part of the order issuing notice under Sec. 250 of the Code of Criminal Procedure is set aside.

6. The learned Counsel for the accused has submitted that since the accused have been acquitted, they cannot be prosecuted again in view of the provisions of Sec. 300 of the Code of Criminal Procedure and Art. 20(3) of the Constitution of India because that would amount double jeopardy. There is no merit in this contention because there is not goind to be a fresh complaint for the same offence. It will be the same complaint to be tried. If the contention of the learned Counsel were to be accepted, once there is acquittal, there cannot be appeal against acquittal and in such appeals against acquittal, High Court cannot pass any order for remand or retrial. The powers of the appellate Court are mentioned in Sec. 386 of the Code of Criminal Procedure under which appellate Court in an appeal from an order of acquittal can reverse such order and direct that further inquiry be made or that the accused be retried or committed for trial or find him guilty and pass sentence on him according to law. In view of this express provision, there is no difficulty whatsoever and there is no bar in setting aside the order of acquittal and sending the matter for trial is accordance with law.

7. In the result, all these appeals are allowed and the impugned judgment and orders of acquittal and dismissal of complaint are set aside and the cases are remanded back to the learned Chief Judicial Magistrate, Bhavnagar. The direction for issuance of notice under Sec. 250 of the Code of Criminal Procedure Code is also hereby set aside.

(KMV) *Appeals allowed; case remanded.*

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SPECIAL CIVIL APPLICATION

Before the Hon'ble Mr. Justice A. P. Ravani and the Hon'ble Mr. Justice J. U. Mehta.

SATTAR HABIB HAMDANI v. UNION OF INDIA & ORS.*

Constitution of India, 1950 - Arts. 226 & 227 - Where an alternative remedy be it onerous or not, or whether it has been pursued or not, is available, the High Court will not exercise writ jurisdiction.

When an alternative remedy is provided for by the statute, the party should be directed to exhaust the same. (Para 7)

In the case of *Sales Tax Officer v. M/s. Shiv Rattan,* AIR 1966 SC 142, the Supreme Court in terms held that simply because the remedy provided for under the ordinary law is little more onerous it is no ground for not directing the petitioner to exhaust the remedy provided for by the statute. (Para 6)

Even in cases where the party who had the alternative remedy but has not availed of the same or allowed the alternative statutory remedy to become infructuous in absence of satisfactory explanation for such conduct the party cannot be permitted to invoke the extra ordinary jurisdiction under Arts. 226/227 of the Constitution of India. (Para 7)

Titaghur Paper Mills Co. Ltd. v. State of Orissa (1), Sales Tax Officer v. M/s. Shiv Rattan (2), Ambalal Sarabhai Enterprises v. Union of India (3) and Spl. Civil Application No. 6149 of 1989 decided on 12-9-1989 (4), followed.

R. S. Gajjar, for the Petitioner.

RAVANI, J. Three Trucks loaded with contraband articles such as Fabrics, Car tape sterio, Telephone sets, Wrist Watches etc. collectively valued at Rs. 27,39,050/- were intercepted by Porbander Police. The Trucks were handed over to the officers of the Customs Department which in turn seized the goods found therein. In follow up action 80 packages of contraband goods valued at Rs. 24,30,875/- were recovered from the factory premises belonging to the petitioner. The petitioner and others were served with show cause notices calling upon them as to why action proposed to be taken in the notice be not taken against them.

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*Decided on 6-10-1989. Special Civil Application No. 7146 of 1987 for a writ quashing the order passed by the Central Excise & Gold Appellate Tribunal in Appeal No. 265 of 1984.

(1) AIR 1983 SC 603 (2) AIR 1966 SC 142 (3) 1987 (1) GLR 392.
(4) Spl. Civil Appli. No. 6149 of 1989 decided on 12-9-1989 by Guj. High Court.