

Mahabir Vs. State

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Court : Allahabad

Decided On : Sep-03-1958

Reported in : AIR1959All783; 1959CriLJ1390

Judge : M.C. Desai, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 403; [Evidence Act, 1872](#) - Sections 115

Appeal No. : Criminal Revn. No. 543 of 1958

Appellant : Mahabir

Respondent : State

Advocate for Def. : Asst. Govt. Adv.

Advocate for Pet/Ap. : P.C. Chaturvedi, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

M.C. Desai, J.

1. The applicant challenges his conviction for the offence of section 5 Telegraph Wires Act only on one ground, namely, that his trial was barred by section 403, Cr.

P. C. The ground arises in these circumstances. The applicant was once before tried for the same offence on the basis of a sanction obtained from the Senior Superintendent of Police. Under the law he could be tried on a sanction from the Superintendent of Police. The trial court convicted the applicant and he filed an appeal.

In the appellate court he took the plea that the sanction having been given by the Senior Superintendent of Police was invalid because 'Senior Superintendent of Police is not the same thing as' Superintendent of Police. Some how or other this plea was accepted by the appellate court and it set aside the applicant's conviction and acquitted him. Thereupon the prosecution obtained its sanction from the Sub Divisional Officer Telegraph, who is another authority competent to sanction prosecution and on the basis of that sanction the applicant was put on trial again on the same allegations and has again been convicted.

Before me it was contended by Sri P. C. Chaturvedi that there is no distinction between Senior Superintendent of Police and Superintendent of Police; that the sanction from the Senior Superintendent of Police was valid, that the previous trial was therefore valid, that the acquittal of the applicant was on a wrong ground and that the acquittal, even if on a wrong ground, but in a valid trial, bars second trial or prosecution on the same allegations. It is true that an acquittal even on an erroneous ground, whether of fact or of law, bars second trial on the same allegations, but the matter is not so simple.

Here the fact is that the applicant himself pleaded in the previous trial that it was invalid on account of want of sanction of a competent authority, and that plea was accepted by the appellate court and he was acquitted with the necessary legal consequence that on a fresh sanction of a competent authority he could be tried again. Now when he is tried again and convicted he turns round and claims that the previous trial was valid. I have no doubt that he is estopped from pleading that the previous sanction was of a competent authority. He cannot blow hot and cold in the same breath and cannot adopt absolutely contradictory positions in the same matter.

Having succeeded in the plea that the previous sanction was not of a competent authority and hence the previous trial was invalid and thereby having invited retrial on a fresh sanction by a competent authority, he cannot be permitted to contend that the previous sanction was of a competent authority, and that consequently the second trial is barred. If the law were to permit such approbation and disapprobation by anyone, the administration of justice would be reduced to a mockery.

The principle of estoppel applies as much in a criminal case as in a civil case and it can be applied even in a matter concerning jurisdiction. Mere consent cannot confer jurisdiction, but there is absolutely no occasion for applying that doctrine here; the courts below assumed jurisdiction to try the applicant not on account of any consent given by him at the trial but on account of the result of the previous trial. Moreover it is not universally true that consent cannot confer jurisdiction; in certain cases it can.

2. 'A party to a criminal proceeding cannot assume inconsistent positions in the trial and appellate courts and as a general rule will not be permitted to allege an error in a proceeding in the trial court in which he himself acquiesced, or which was committed or invited by him, or was the natural consequence of his own actions: 24 Corpus Juris Secundum 'Criminal Law', paragraph 1842.

Then a judgment debtor filed an objection against sale under section 47 C. P. C. and on his objection being dismissed he filed a suit to challenge the sale, it was held that he could not be heard to say, in reply to the objection of the decree holder that the suit was barred by section 47, that his objection did not lie under section 47: *Girish Chandra v. Purna Chandra* : AIR1944 Cal53 .

3. In *Delaney v. United States* (1923) 263 U. S. 586: 68 Law Ed 462 a judge was under a certain law incompetent to sit on a bench to try a certain person but the person was held estopped from challenging after the trial his jurisdiction to sit on the bench. It is stated in 22 Corpus Juris Secundum 'Criminal Law,' paragraph 147 that though jurisdiction to take cognizance of an offence cannot be conferred on a court by the consent of the accused; where however a court has jurisdiction of the subject matter, the jurisdiction of the person of the accused may be

conferred by consent or by waiver.

That the court is not a legal court or has no jurisdiction of the offence cannot be waived nor can the doctrine, of estoppel be invoked to confer jurisdiction; but that the organisation of court is faulty, though otherwise legal, may be waived as also an objection to irregularities in preliminary matters or procedure *ibid* paragraph 161. It is stated in 22 *Corpus Juris Secundum*, 'courts' paragraph 108 etc. that jurisdiction of the subject matter cannot be based on the estoppel of a party to deny that it exists but as to other objection to jurisdiction there may be an estoppel; a party may be estopped if he invokes the jurisdiction as by instituting a suit or filing a counter case or bringing a cross action or accepting benefit resulting from the court's exercise of jurisdiction and he will not be permitted to deny the existence of jurisdictional elements which he previously alleged or asserted. What cannot be waived is an absolute want of jurisdiction of the subject matter or cause of action *vide* paragraph 109. The trial court in this case had jurisdiction over the subject matter and also over the person of the applicant; it was competent to try him and to try an offence under section 5, Telegraph Wires Act. A person cannot be said to be in second jeopardy unless his prior conviction; (sic) where an accused got his prior conviction set aside on the ground of want of jurisdiction he is estopped subsequently from asserting in support of defence of previous jeopardy, that such court had jurisdiction; see 22 *Corpus Juris Secundum*, 'Criminal Law,' paragraph 244.

In *Hakim Syed Shah Khurshed Ali v. Commissioner of Tirhut Division* : AIR1955 Pat198 it was held that a party denying the jurisdiction of a particular Tribunal and succeeding in that plea cannot deny the truth of it in subsequent proceedings before another Tribunal. In criminal cases the doctrine of *res judicata* operates 'to conclude those matters in issue which the former verdict determined 'see *United States of America v. Williams* (1950) 95 Law Ed 747 at p. 751: 341 U. Section 58, and *Sealfon v. United States* (1947) 92 Law Ed, 180: 332 U. Section 575.

Notwithstanding that consent cannot give the court jurisdiction, the parties may admit the existence of facts which show jurisdiction and the court may act judicially upon such an admission *Pittsburgh C. and St. L. R. Co. v. Ramsey*, (1877)22 Wall.

322: 22 Law Ed 823. Jurisdiction cannot be conferred upon a tribunal by the parties only when there is inherent lack of it; but where the want of jurisdiction has to depend upon the proof of certain facts, then if those facts have not been raised and proved, a party cannot be permitted to raise a plea of want of jurisdiction so as to render its decision void and ineffective, see *National Coal Co. Ltd. v. L. P. Dave*, : AIR1956 Pat294 . If a party is estopped from raising and proving a plea, it is as good as his failing to raise and prove it. It is only a total want of jurisdiction which cannot be cured by assent, *Jones v. Owen*, (1848) 5 Dowl. and L. 669; 79 R. R. 888. There was no total want of jurisdiction in the trial court in the present case. In *Cornwall Township v. Ottawa and New York Rly. Co.* (1916) 52 SCR 466 at p. 497 it was observed that

'consent can give jurisdiction when it consists only in waiver of a condition which the law permits to be waived; otherwise it cannot. Where want of jurisdiction touches the subject matter of the controversy or where the proceeding is of a kind which by law or custom has been appropriated to another tribunal then mere consent of the parties is inoperative.'

It was further observed that where the proceeding is of a character appropriate to a tribunal which has in given conditions jurisdiction over the subject matter it is competent to the parties to agree and recognise the validity of the tribunal's judgment and thereby to preclude themselves from raising afterwards the objection that in the particular case some condition of jurisdiction was wanting in fact. What can be achieved by consent can be achieved through estoppel.

4. There is therefore no doubt whatsoever that the applicant can be estopped from pleading that the previous sanction was valid and is so estopped by his getting his previous conviction quashed on the ground that it was invalid. Once he is estopped from pleading that the previous sanction was valid, the previous trial must be held to be invalid and the second trial cannot be held to be barred by section 403 Cr. P. C.

The application is dismissed.