

Gopi Nath Vs. the State

Gopi Nath Vs. the State

SooperKanoon Citation : sooperkanoon.com/477527

Court : Allahabad

Decided On : Aug-16-1978

Reported in : 1979CriLJ414

Judge : S.C. Mathur, J.

Appellant : Gopi Nath

Respondent : The State

Advocate for Pet/Ap. : Smt. Usha Chatterji

Judgement :

ORDER

S.C. Mathur, J.

1. The present revision is directed against the orders passed by the Courts below refusing to drop or quash criminal proceedings pending against the petitioner in the Court of the learned Additional District Magistrate (Judicial) Sitapur. The applicant's plea is that on the same set of facts on which the present prosecution is based he was prosecuted earlier and was convicted and, therefore, the second prosecution on the same set of facts is barred. In support of this plea the applicant has relied upon Clause (2) of Article 20 of the Constitution of India, Section 26 of the General Clauses Act and Sub-section (1) of Section 403 of the Cr.P.C. In order to appreciate the controversy it is necessary to narrate the history of the case.

2. The applicant is a dealer in food grains and has his shop in Kesriganj within the Circle of P. Laharpur, District Sitapur. On 21-5-1971 Sri Yogendra Bux Singh, Food Inspector, visited his shop suspecting adulteration in gram wanted to take sample thereof. In order to take the sample he expressed desire to purchase 600 grammes of gram. It is alleged that the applicant refused to sell gram to said Sri Singh and he pushed him out of the shop and thereafter put his lock on the shop, thus preventing Sri Singh from taking the sample. A first information report of the incident was lodged at P. S. Laharpur on 21-5-1971 at 6.55 p.m. under Section 353 of the I. P. C. The incident itself was said to have taken place at 6 p.m. Thereafter on 22-5-1971 the Food Inspector sent a charge-sheet to the Sub-Divisional Magistrate, Sitapur under Section 16(1)(b) read with Section 10/1 of the Prevention of Food Adulteration Act. On the basis of the Charge-sheet submitted by the Food Inspector, the Sub-Divisional Magistrate Sitapur ordered on 26-5-1971 for the case to be registered against the present applicant and also ordered summoning of the accused. After the applicant had put in appearance the learned Magistrate framed charge against him under Section 16(1)(b) of the Prevention of Food Adulteration Act in following terms:

Dinank 21-5-71 ko turn karib 6 baje Sham apani galley ki dukan par gehun, chana, arhar bikri hetu rakhey Khadya Nirikshak Laharpur dwara paya gaya aur jiska licence mangne par tatha namoone ke llye milavat ka Shak hone par 600 grams chana dene se inkar kiya aur Khadya Nirikshak ko apshabd kahte have jabaran unhe dukanse baahar kar dukan men tala laga diya.

(underlined by me)

3. The applicant was tried on the basis of the above charge and the learned Magistrate found him guilty of the charge and convicting him sentenced him to pay the fine of Rs. 500/- or in default to undergo rigorous imprisonment for the period of six months. This order of the learned Magistrate was passed on 15-5-1972. Against this order the applicant preferred appeal before the learned Sessions Judge. The learned I Temporary Civil and Sessions Judge by his order dated 22-6-1972 dismissed the appeal.

4. While the above proceedings were pending in the Court of Sub-Divisional Magistrate, a charge sheet was submitted by the Police under S 353 of the I. P. C. on 30-6-1971. On coming to know of the submission of the charge sheet against him the applicant surrendered before the learned Magistrate on 27-5-1971 and was subsequently bailed out. The learned Magistrate framed charge against the applicant on 16-3-1972, as indicated therein before the judgment of the learned Magistrate in the earlier trial was passed on 15-5-1972. Thus when the charge was framed on 16-3-1972 in the second case the earlier case was still pending. The charge framed on 16-3-1972 in the second trial was in following terms:

That you on or about 6-00 p. m. in Mohalla Kesariganj, P. S. Laharpur, district Sitapur, assaulted Sri Yogendra Bux Singh, Food inspector, a public servant to wit by pushing him out of your updown_ and not allowing him to take sample of gram in the execution of his Duty as such public servant.

(underlined by me)

On 10-7-1972, that is, after the appeal arising from the judgment in the earlier case had been disposed of the present applicant moved an application before the learned Magistrate trying the second case that he had already been prosecuted and convicted on same set of facts under Section 16(1) of the Prevention of Food Adulteration Act and, therefore, the present prosecution was barred. This application was rejected by the learned Magistrate by his order dated 1-11-1972. The applicant preferred revision but the same was also dismissed on 1-6-1973 by the learned Sessions Judge, Sitapur. The applicant is aggrieved by these two orders and that is how he has approached this Court.

5. As already indicated hereinabove the applicant's case is that the present prosecution is barred under the provisions of Constitution of India, General Clauses Act and the Code of Criminal Procedure. The argument of the learned Counsel for the applicant was that the offences alleged in the two criminal cases were based on the same set of facts and in fact constituted one and the same offence. In case the argument of the learned Counsel is accepted that the acts alleged against the applicant constitute one and the same offence certainly the present prosecution against him would be barred. In case, however, it is found that

the offence alleged in the earlier case was different and distinct from the offence involved in the present case, the provisions of clause (2) of Article 20 of Constitution of India and Section 26 of General Clauses Act will not at all be attracted. Clause (2) of Article 20 of the Constitution of India is in following terms:

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

In order to attract Clause (2) reproduced above it is essential that the offence involved in the two prosecutions should be one and the same. It is, therefore, necessary to find out whether the offence or offences involved in the two prosecutions are one and the same or are distinct, in order to appreciate the controversy it is necessary to examine the provisions of Section 16 of the Prevention of Food Adulteration Act and Section 353 of I. P. C. Clause (b) of Sub-section (1) of Section 16 of the Prevention of Food Adulteration Act provides as follows :

16(1) If any person

(b) prevents a Food Inspector from taking a sample as authorised by this Act; or ... he shall in addition to the penalty to which he may be liable under the provisions of Section 6, be punishable

(i) for the first offence, with imprisonment for a term which may extend to one year or with fine which may extend to Rs. 2000/-, or with both;

(ii) for the second offence with imprisonment for a term which may extend to two years and with fine.

6. In order to prove the offence under the above provision all that is required to be proved is that the Food Inspector was prevented from taking the sample. The prevention of the Food Inspector from taking the sample may take place in various ways. It is not necessary that the element of assault must come in. In case the preventing is accompanied with assault the accused person would be liable for assaulting also, but that would be not under the above provision but under some other provision. My attention was also not drawn to any provision in the Prevention

of Food Adulteration Act itself under which the offence of assaulting a public servant may be punishable. Such an offence is certainly punishable under Section 353 of the I. P. C. which provides as follows :

353, Assault or criminal force to deter public servant from discharge of his duty,

Whoever assaults or uses criminal force to any person being a public servant in the execution of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be- done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. From what has been stated herein-above it will be seen that the offence for which the applicant was tried earlier was quite distinct from the offence for which he is being tried now. In this view of the matter I am of the opinion that the present trial is not barred under Clause (2) of Article 20 of the Constitution of India. The applicant's reliance upon Section 26 of the General Clauses Act 1897, is equally misconceived. Section 26 provided as follows :26. Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.

Under the above provision also the offence should be the same. If the act which the accused is alleged to have done amounts to commission of two offences Section 26 will not bar two trials in respect of the two offences. Section 26 In fact contemplates those cases where the acts alleged fall within the definition of offence under the two enactments, I have already Indicated hereinabove that the applicant could not be prosecuted for assaulting a Food Inspector under the provisions of the Prevention of Food Adulteration Act. Thus assaulting a Food Inspector was not an offence under the Prevention of Food Adulteration Act but was an offence under Section 353 of the I, P. C. It is not a case where the same act constitutes offence under two distinct enactments. It is a case where it is an offence only under one enactment viz. I. P. C.

7. I will now take up the third limb of the argument advanced on behalf of the learned Counsel for the applicant. This argument was based on Section 403 of the Cr.P.C. 1898. Reliance was placed by the learned Counsel for the applicant upon Sub-section (1) of the said section which is in the following terms:

403(1). A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which_ a different charge from the one made against him might have been made under Section 236, or for which he might have been convicted under Section 237.

(underlined by me)

7-A. The first part of Sub-section (1), reproduced above prescribes the same principle as is contained in cl, (2) of Article 20 of the Constitution of India. So far as the applicant's argument based upon the first part of Sub-section (1) is concerned the finding recorded by me in' respect of Article 20 of the Constitution; will be applicable here also. The learned; counsel then vehemently relied upon the portion contained in Sub-section (1) which; has been underlined by me. The latter¹, portion of Sub-section (1) contemplates cases covered by Section 236 of the Cr.P.C. The said section deals with cases where it is doubtful as to which offence has actually been committed by the accused person in a single act or In a -series of acts. It has no application where there is no doubt as to the offence committed by the accused. Section 237 is a complementary to Section 236. In the present case there is absolutely no doubt as to the offence actually committed by the applicant. As already indicated hereinabove the act or acts of the applicant led to two distinct offences, one punishable under the Prevention of Food Adulteration Act and the other punishable under the I. P. C. Thus I am clearly of the opinion that the applicant cannot derive any benefit even from the latter part of Sub-section (1) of Section 403 of Cr.P.C. In fact the applicant's case is clearly covered by Sub-section (2) Section 403 which provides as follows:

403(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against

him on the former trial under Section 235, Sub-section (1).

8. The two offences with which the applicant was charged were committed in one series of acts which are so connected together as to form the same transaction and, therefore, the applicant could be charged with both the offences and tried at one trial for every such offence, as is prescribed under Sub-section (1) of Section 235 of the Cr.P.C. Therefore in view of the provision made in Sub-section (2) of Section 403 of Cr.P.C. the present trial of the applicant is not barred. In taking this view I am supported by the authorities rendered by their Lordships of the Supreme Court as well as by this Court.

9. In the case of *State of Bombay v. S. L. Apte* AIR 101 SC 578 the accused persons had received certain amounts on behalf of an Insurance Co. but they did not deposit those amounts with the company. They were prosecuted under Section 409 of the Indian Penal Code and Section 15 of the Insurance Act, They were convicted and sentenced under Section 409 I. P. C. but were discharged for offence punishable under Section 15 for want of sanction from the competent authority. After obtaining the necessary sanction a second prosecution was launched against the accused persons under Section 15 of the Insurance Act and it was held by their Lordships of the Supreme Court that the second trial was not barred. Their Lordships held that the two offences were distinct and the principle of double jeopardy, was not applicable. While holding that the second trial was not barred their Lordships considered Clause (2) of Article 20 of the Constitution, Section 26 of the General Clauses Act and Sub-section (2) of Section 403 of the Cr.P.C.

10. In the case of *Maidhan Gupta v. State of U. P.* (1976 Cri LJ 868) (All) the accused had deducted from the wages of his employees the amount which they (the employees) were liable to contribute under the Employees' Provident Funds Act, but did not deposit the same with the relevant authority as prescribed by law. They were prosecuted under Section 14 of the Employees' Provident Funds Act and were convicted. Thereafter a complaint was lodged against the said accused under Section 409 of the I. P. C. for misappropriation. It was held by Harl Swarup, J. that the offence punishable under Section 14 of the Employees' Provident

Funds Act was distinct from the offence punishable under Section 409 of the Indian Penal Code, and, therefore, the second trial for the offence punishable under Section 409 was not barred. In holding thus, Hari Swarup, J. relied upon the dictum laid down by their Lordships of the Supreme Court in *State of Bombay v. S. L. Apte* (supra).

10A. The facts of the present case are very much akin to the facts, of *Maidhan Gupta's case* (supra). I am in respectful agreement with the view taken by Hari Swarup J. in the said case.

11. Smt. Usha Chatterji, learned Counsel for the applicant relied upon a number of decisions in support of her contention that the second prosecution was barred. It will not be necessary for me to consider all the said authorities in detail. Some of the authorities have absolutely no application and the sum and substance of the authorities which are relevant is that even if the offence involved in the second trial is distinct from the offence which was the subject matter of the earlier trial the findings of fact recorded in the earlier trial would be final between the parties in the subsequent trial. These authorities actually lay down the principle of 'issue estoppel'. The view expressed in majority of these decisions is that once a competent court of law has recorded a finding in respect of a disputed question of fact the said fact should not become subject matter of dispute in a subsequent trial and that the finding already recorded in respect of that fact should become final between the parties. This is very much akin to the principle of *res judicata* which applies in civil proceedings. In fairness to Srimati Chatterji I may however, indicate the authorities upon which she placed reliance. These authorities are : 1972 CriLJ909 . The question of 'issue estoppel' was specifically dealt with by their Lordships of the Supreme Court in the case of *Pritam Singh v. State of Punjab* : 1956 CriLJ805 , *Manipur Administration, Manipur v. Thokchom Bira Singh* 0065/1964 : [1964]7SCR123 and in *Lalta v. State of U. P.* : 1970 CriLJ1270 .

12. Upon a consideration of the above authorities the position that emerges out is that although the second trial for distinct offence may not be barred but the findings recorded in respect of disputed questions of fact in the earlier trial will be final and binding between the parties in the subsequent trial.

12A. Smt. Usha Chatterji then argued that if the principle of issue estoppel is applied to the facts of the present case, the consequence will be that the finding of guilt already recorded in the earlier trial would become final for the purposes of the present case and in the present trial the learned Magistrate would be required (sic). In this view of the matter her submission was that even though the second trial could not be barred it was preeminently just and proper that the applicant should have been tried in one trial in respect of both the offences alleged against him and the second trial, in the circumstances of the case, is nothing except harassment and abuse of the legal process. Authority is not wanting for the proposition that even if a subsequent trial is not barred the court may in appropriate cases refuse to proceed with the second trial.

13. In *Narasingha Rout v. Rameswar Mohapatra* : AIR1958 Ori141 it was observed by the learned Judge of the Orissa High Court that there may be occasions when it would not be appropriate to order a second trial even though the second trial may not be barred by the letter of Section 403 Cr.P.C. One of the instances mentioned in this Authority is where the second trial would amount to harassment of the accused. In this case a complaint was made against the accused person under Sections 426 and 380 of the I. P. C. The Police reported that proof of removal of properties was not available. In this view of the matter the learned Magistrate issued summonses only for the offence of breaking open the lock under Section 426 of the I. P. C. This complaint was dismissed in default of appearance on behalf of complainant. Afterwards a second complaint was made against the same accused under Section 380 of the I. P. C. It was on these facts that the learned Judges of Orissa High Court held that the second complaint should not be proceeded with. It was further observed that when the first complaint was pending the learned Magistrate was satisfied with the police report that there was no proof of removal of properties and, therefore, the learned Magistrate did not issue summonses under Section 380 I. P. C. and when the fresh complaint was filed there was no fresh material before the learned Magistrate to change his earlier view and that to hold a prima facie case under S, 380 of the I. P. C. had been made out.

14. In *Jagdish Prosad v. Emperor* : AIR1938 Cal697 the learned Judges of the Calcutta High Court held that successive trials deprive the court of the discretion of making sentences to run concurrently and, therefore, the second trial even if not technically barred should not be encouraged. In this judgment the learned Judges did not hold that the second trial was absolutely without jurisdiction. The second trial had already taken place and the accused had been convicted and sentenced in the second trial also, apart from having been convicted and sentenced in the earlier trial. The learned Judges of the Calcutta High Court, after maintaining the conviction and sentence, provided that the sentence imposed in the second trial would run concurrently with the sentence imposed in the earlier trial.

15. In *Emperor v. Anant Narayan* AIR 1945 Bom 413 the accused was found to have misappropriated the sum of Rs. 655-0-6. Two complaints were filed against him. In the first complaint he was charged with having committed offences punishable under Sections 409 and 466 of the I, P. C. for having misappropriated the sums of Rs. 10/- and Rs. 40/- out of the total sum of Rs. 655-0-6, hereinbefore mentioned, between 19-3-1941, to 19-6-1941 and forged two receipts with respect to these amounts. A third complaint was filed in which the accused was charged under Section 409 with criminal breach of trust in respect of the sum of Rs. 572-15-8. This amount was also comprised in the total sum of Rs. 655-0-6 hereinbefore mentioned. This criminal breach of trust was alleged to have been committed between the period commencing on 25-4-1941 and ending on 19-6-1941. This period fell within the period 19-3- 1941 to 19-6-1941 hereinbefore mentioned. The accused was held in the trial originating from first two complaints holding that the third trial was not proper the learned Judge observed that the prosecution knew all the facts from the beginning and the accused could have been tried in one trial in respect of all the three offences under Section 222 of the Code of Criminal Procedure and that no additional evidence was required for proving the offences complained of in the third complaint, On these facts it was considered that the third prosecution was not proper.

16. In *G. Ramchandra Chetty v. State of Andhra* AIR 1956 Andhra 102 it was held that even where Section 403 Cr.P.C. was not applicable the wider principle of 'autre fois convict' underlying the section could be invoked in favour of the

accused. In this case the accused was charged with misappropriating the sum of Rs. 400/- collected by him as Bill Collector on 26-6-1950 from a firm and with wilful and fraudulent falsification of accounts with regard to the same. In this trial he was convicted and sentenced to 5 years' simple imprisonment and a fine of Rs. 500/- or in default three months' simple imprisonment. The trial which was the subject-matter of the judgment in question was for offence punishable under S, 5 (1) (c) read with Section 5(2) of Act No. 2/47 or for having misappropriated the sum of Rs. 4,700/- between 8-1-1951 and 31-3-1951. The learned Judges of the Andhra High Court quashed the proceedings in the second trial.

17. I am in respectful agreement with the view expressed in the above decisions so far as they lay down that in appropriate cases the second trial may not be proceeded with. Thus, the matter is in the discretion of the Court and like all judicial discretions this discretion has to be exercised on sound judicial principles. The question thus arises whether it is possible to enumerate all the circumstances in which the second trial may not be proceeded with. I do not intend to catalogue the circumstances in which the Court while exercising the discretionary power will refuse a second trial but some of the circumstances which occur to my mind and which are deducible from the authorities referred to above are as follows:

(1) When at the earlier trial the prosecution under a particular section was dropped on account of lack of evidence and second trial was sought to be started without indicating the discovery of any fresh evidence or material;

(2) When the prosecution being in possession of all the facts instead of prosecuting at one trial in respect of all the charges splits up the charges and launches prosecution in respect of one or some of the charges at one time and thereafter launches prosecution in respect of the remaining or some of the other charges. This would clearly be a case of harassment of the accused and an abuse of the legal process.

18. The first circumstance is obviously not attracted in the present case. So far as the second circumstance is concerned, it has to be noticed that the prosecuting agency in respect of an offence under Section 353 of I. P. C. is different from the prosecuting agency in respect of the offence under Section 16(1)(b) of the

Prevention of Food Adulteration Act. Section 20 of the Prevention of food Adulteration Act 1954 provides that no prosecution for an offence under the Act shall be instituted except by or with the written consent of the Central Government or the State Government or a local authority or a person authorised in this behalf by general or special order by the Central Government or State Government or Local authority. Under this section, therefore, the prosecution in respect of an offence under the Act can be started only at the instance of the person contemplated in this section. On the contrary the prosecution under Section 353 of the I. P. C, is started at the instance of the ordinary prosecuting authority viz. the police. It is true that a report of the occurrence had been lodged by the Food Inspector at P. S. Lakharpur on 25-1-1971 at 6.66 (?) P. M. but the police had no power to prosecute the applicant under Section 16(1)(b) of the Prevention of Food Adulteration Act, nor the Food Inspector had power to prosecute the applicant under Section 353 Of the I. P. Code. Thus it is not a case where the prosecuting agency can be said to be possessed of all the facts relating to the two prosecutions. It is further to be noticed that on the basis of the complaint lodged by the Food Inspector the prosecution under the Prevention of Food Adulteration Act had already started and it was during the pendency of this prosecution that the police submitted charge sheet and prosecution under Section 353 of the I. P. C. started. The two prosecutions were not pending in the same court also. In such circumstances it was open to the applicant to have moved an application for transfer of both the cases to one court. Once the cases had been transferred to one and the same court, the two cases would be combined together and evidence led in one case could be read as evidence in the other case also. In this view of the matter I am unable to hold that the prosecuting agency was to blame for not prosecuting the applicant in one trial in respect of both the offences. Thus the present case cannot be branded as a case of harassment of the accused or of the abuse of the legal process. On the contrary it can legitimately be said that the applicant took his chance in the earlier prosecution. Against the conviction recorded by the learned Magistrate he preferred an appeal before the learned Sessions Judge. It was only after his appeal had been dismissed that he moved an application before the learned Magistrate for dropping the proceedings which have given rise to the present revision. Thus if any party is guilty of mala fide

conduct it is the applicant himself. In this view of the matter I am of the opinion that the prosecution which has been launched against the applicant under Section 353 of the I. P. Code should proceed.

19. In view of the above discussion I do not see any force in the revision and dismiss the same. The lower court record shall be sent back expeditiously so that the trial does not remain unnecessarily held up.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com