Supreme Court of India
The State Of Bombay vs S. L. Apte & Another on 9 December, 1960
Equivalent citations: 1961 AIR 578, 1961 SCR (3) 107
Author: N R Ayyangar
Bench: Ayyangar, N. Rajagopala

PETITIONER:
THE STATE OF BOMBAY

Vs.

RESPONDENT:
S. L. APTE & ANOTHER

DATE OF JUDGMENT:
09/12/1960

BENCH:
AYYANGAR, N. RAJAGOPALA
BENCH:
AYYANGAR, N. RAJAGOPALA
DAS, S.K.
SARKAR, A.K.
MUDHOLKAR, J.R.

CITATION:
1961 AIR 578 1961 SCR (3) 107
CITATOR INFO :
R 1965 SC 87 (6)
R 1965 SC 682 (11)
F 1988 SC1106 (7,8)
R 1989 SC 1 (8)

ACT:
Double Jeopardy-Rule-"Same offence"-Test-Constitution of India, Art. 20(2)-General Clauses Act, 1897 (10 Of 1897), s. 26 -Indian Penal Code, 1860 (XLV of 1860), s. 409-Insurance Act, 1938 (IV Of 1938), s. 105.

HEADNOTE:
By Art. 20(2) of the Constitution "No person shall be prosecuted and punished for the same offence more than once."
Section 26 of the General Clauses Act, 1897, provides,
"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."
The respondents were both convicted and sentenced by the Magistrate under s. 409 Of the Indian Penal Code and S. 105

Of the Insurance Act. The Sessions judge on appeal upheld the conviction and sentence under S. 409 of the Indian Penal Code, but set aside the conviction and sentence under s. 105 of the Insurance Act on the ground that no sanction under s. 107 of the Insurance Act had been obtained. Sanction was thereafter obtained and a fresh complaint was filed against the respondents under s. 105 of the Insurance Act. The trial ended in an acquittal by the Magistrate who held that Art. 20(2) Of the Constitution and also s. 26 of the General Clauses Act were a bar to conviction. The State appealed to the High Court against the
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order of acquittal but the appeal was dismissed. On further appeal by the State,
Held, that the crucial requirement to attract Art. 202) Of the Constitution is that the two offences should be identical. it is, therefore, necessary to analyse and compare the ingredients of the two offences, and not the allegations made in the two complaints, to see whether their identity is established.
So judged, there can be no doubt that in spite of the presence of certain common elements between the two, the offences under S. 409 of the Indian Penal Code and S., 105 of the Insurance Act are distinct in their ingredients, content and scope and cannot be said to be identical.
Om Prakash Gupta v. State of U. P., [1957] S.C.R. 423 and State of Madhya Pradesh v. Veereshw ar Rao Agnihotry, [1957] S.C.R. 868, referred to.
A similar view of the scope of the rule as to double-jeopardy has always been taken by the American Courts.
Albrecht v. United States, (1927) 273 U. S. 1: 71 Law Ed. 505, referred to.
In S. 26 of the General Clauses Act also the emphasis is not on the facts alleged in the two complaints but on the ingredients of the two offences charged.
This construction of Art. 20(2) of the Constitution and S. 26 of the General Clauses Act, 1897, is precisely in line with s. 403(2) of the Code of Criminal Procedure.
Consequently, it could not be said, in the instant case, that the respondents were being sought to be punished for the same offence so as to attract either Art. 20(2) Of the Constitution or S. 26 of the General Clauses Act, 1897.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 63 of 1957.

Appeal from the judgment and order dated March 2, 1956, of the Bombay High Court in Cr. A. No. 1258 of 1955. H. R. Khanna and R. H. Dhebar, for the appellant. N. S. Bindra, for the respondents (Amicus curiae). 1960. December 9. The following Judgment of the Court was delivered by

AYYANGAR, J.-This appeal on a certificate under Art. 134(1) of the Constitution granted by the High Court of Bombay, principally raises for consideration the application and scope of Art. 20(2) of the Constitution and s.26 of the General Clauses Act.

The facts necessary for the appreciation of the points involved in this appeal are few and may be briefly stated. The two respondents-S. L. Apte and Miss Dwarkabai Bhat-were respectively the Managing Director, and the Managing Director of the Women's department, of an insurance Company by name 'The Long Life Insurance Company' which had its headquarters at Poona. A power of attorney had been executed by the company in favour of the first respondent in June, 1942, under which he was vested with the power, control and possession inter alia of the moneys belonging to the company with a view to have them invested in proper securities. The second respondent as Manaaing Director also acted under another power of attorney executed by the company in her favour in or about June, 1942, and by virtue thereof she was assisting the first respondent in main- taining the accounts of the company. While the respondents were thus functioning, an audit conducted in 1952 disclosed that considerable sums of money amounting to over Rs. 55,000 were shown as cash balances with the first respondent. Further enquiries made by the Directors showed that moneys aggregating to over Rs. 95,000 had from time to time been withdrawn from the company by the first respondent with the assistance and sanction of the second respondent, professedly for the expenses of the company. Among the papers of the company was a voucher dated August 9, 1952, evidencing the withdrawal of this amount by the first respondent and signed by him and this also bore the signature of the second respondent in token of her sanction. The respondents, however, could furnish no proper account of the legitimate expenses of the company for which the amount was purported to be taken.

Both the respondents were thereupon prosecuted for an offence under s. 409 of the Indian Penal Code and also for an offence under s. 105 of the Indian Insurance Act in Criminal Case 82 of 1953. The learned Magistrate convicted and sentenced both the respondents for both the offences with which they were charged. The respondents thereupon filed appeals to the Court of the Sessions Judge, Poona and the learned Sessions Judge, by his order dated May 3, 1954, while confirming the conviction and sentence on the respondents under s. 409 of the Indian Penal Code set aside their conviction under s. 105 of the Indian Insurance Act. The reason for the latter order was the finding of the learned Sessions Judge that the sanction required by s. 107 of the Indian Insurance Act which was a prerequisite for the initiation of the prosecution under s. 105 had not been obtained before the complaint in respect thereof had beed filed. The conviction and sentence under s. 409 of the Indian Penal Code which had been affirmed by the Sessions Judge in both the cases have now become final. Subsequetly the Insurance Company obtained the sanction of the Advocate-General of Bombay under s. 107 of the Indian Insurance Act and filed a complaint in the Court of the Judicial Magistrate, Poona, on January 18, 1955, against the two respondents charging each of them with an offence under s. 105 of the Indian Insurance Act. The Magistrate took the case on file and directed the issue of process. Thereupon the two respondents made an application before the Magistrate on March 22, 1955, praying that the complaint against them may be dismissed as being barred by s. 403(1) of the Criminal Procedure Code, by reason of their previous conviction by the Magistrate for the same offence under the Insurance Act and their acquittal in respect thereof by the Sessions Judge, pleading in addition that when the conviction by the Magistrate stood, they had even

undergone a portion of the sentence imposed. The learned Magistrate overruled this plea on the ground that the acquittal of the respondents was not on the merits of the case, but for lack of sanction under s. 107 of the Indian Insurance Act which rendered the Magistrate without jurisdiction to entertain the complaint. The trial was then proceeded with and evidence was led. But finally the Magistrate acquitted the respondents on the ground that Art. 20(2) of the Constitution and s. 26 of the General Clauses Act were a bar to their conviction and punishment. The State of Bombay thereupon filed an appeal to the High Court under s. 417 of the Criminal Procedure Code. The appeal was dismissed by the learned Judges who however granted a certificate on the strength of which this appeal has been preferred. As the prosecution against the respondents under s. 105 of the Insurance Act has been held to be barred by reason of the provisions contained in Art. 20(2) of the Constitution and s. 26 of the General Clauses Act, it would be convenient to set out these provisions before entering on a discussion of their content and scope.

Article 20(2) of the Constitution runs:

> "No person shall be prosecuted and punished for the same offence more than once." Section 26 of the General Clauses Act enacts: "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."

As the application of these two provisions is conditioned by the identity of the two offences which form the subject of the prosecution or prosecutions, we might as well reproduce the relevant provisions constituting the two offences, viz., s. 409 of the Indian Penal Code and s. 105 of the Indian Insurance Act:

> "409. Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

Criminal breach of trust referred to in the section is defined in s. 405 of the Indian Penal Code in these terms:

> "405. Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged. or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust'."

The offence created by the Indian Insurance Act is as follows:

> "105. (1)'Any director, managing agent, manager or other officer or employee of an insurer who wrongfully obtains possession of any property of the insurer or having any such property in his possession wrongfully withholds it or wilfully applies it to purposes other than those expressed or authorised by this Act shall on the complaint of the Controller made after giving the insurer not less than fifteen days' notice of his intention, or, on the complaint of the insurer or any member or any policy-holder thereof, be punishable with fine which may extend to one thousand rupees and may be ordered by the Court trying the offence to deliver up or refund within a time to be fixed by the Court any such property improperly obtained or wrong- fully withheld or wilfully misapplied and in default to Buffer imprisonment for a period not exceeding two years.
>
> (2)This section shall apply in respect of a provident society as defined in Part III as it applied in respect of an insurer."

Before addressing ourselves to the arguments urged before as by the Yearned Counsel for the appellant State it is necessary to set out one matter merely to put it aside. The entire argument on behalf of the State before the High Court proceeded on denying that the order of a Criminal Court passed under s. 105 of the Indian Insurance Act directing the accused to "deliver up or refund..... any such property improperly withheld or wilfully misapplied" was a "punish- ment" within either Art. 20(2) of the Constitution or s. 26 of the General Clauses Act. The learned Judges of the High Court rejected this contention. Though learned Counsel for the appellant originally submitted that he was contesting this conclusion of the High, Court, he did not address us any argument under that head and we do not therefore find it necessary to dwell on this point any further, but shall proceed on the basis that a direction by the Magistrate to replace the moneys of the insurer with a penalty of imprisonment in default of compliance therewith was a "punishment" within Art. 20(2) of the Constitution and s. 26 of the General Clauses Act.

Turning to the main points urged before us, we may premise the discussion by stating that it was not disputed before us by learned Counsel for the State, as it was not disputed before the learned Judges of the High Court, that the allegations to be found in the original complaint in Criminal Case 82 of 1953 on which the conviction under s. 409 of the Indian Penal Code was obtained were similar to the allegations to be found in the complaint under s. 105 of the Indian Insurance Act. It should, however, be mentioned that there was not any complete identity in the statement of facts which set out the acts and omissions on the part of the respondents which were alleged to constitute the two offences-s. 409 of the Indian Penal Code and s. 105 of the Insurance Act. For instance, in the complaint which has given rise to this appeal, the crucial paragraphs detailing the allegations are 12 and 13 of the complaint which run:

> "12. The company submits that the accused has thus wrongfully obtained possession of Rs. 95,000 or having that property in his possession wrongfully withheld it or wilfully applied it to purposes other than those expressed or authorised by the Insurance Act, 1938, and committed an offence on the 9th August, 1952, under Sectionof the Insurance Act, 1938."

> "13. The company through their Solicitorscalled upon the accused to explain his conduct within7 days from the receipt of the letter. The accused has failed and neglected to reply to the said letters."

It is obvious that on these allegations alone the offence of criminal breach of trust could not be established as they lack any reference to any entrustment or to the dishonest intent which are the main ingredients of the offence of criminal breach of trust. But to this point about the difference in the ingredients of the two offences we shall revert a little later.

Even assuming that the allegations to be found in the two complaints were identical, the question, however, remains whether to attract the ban imposed by either Art. 20(2) of the Constitution or s. 26 of the General ClausesAct on a second punishment, it is sufficient that the allegations in the two complaints are substantiallythe same or whether it is necessary further that theingredients which constitute the two offences should be identical. We shall first take\ up for consideration Art. 20(2) of the Constitution whose terms we shall repeat:

"20. (2) No person shall be prosecuted and punished for the same offence more than once." To operate as a bar the second prosecution and the consequential punishment thereunder, must be for "the same offence". The crucial requirement therefore for attracting the Article is that the offences are the same, i.e., they should be identical. If, however, the two offences are distinct, then notwithstanding that the allegations of facts in the two complaints might be substantially similar, the benefit of the ban cannot be invoked. It is, therefore, necessary to analyse and compare not the allegations in the two complaints but the ingredients of the two offences and see whether their identity is made out. It would be seen from a comparison of s. 105 of the Insurance Act and a. 405 of Indian Penal Code (a. 409 of the Indian Penal Code being only an aggravated form of the same offence) that though some of the necessary ingredients are common they differ in the following:

(1)Whereas under a. 405 of the Indian Penal Code the accused must be "entrusted" with property or with "dominion over that property", under s. 105 of the Insurance Act the entrustment or dominion over property is unnecessary it is sufficient if the manager, director, etc. "obtains possession" of the property. (2)The offence of criminal breach of trust (s. 405 of the Indian Penal Code) is not committed unless the act of misappropriation or conversion or "the disposition in violation of the law or contract", is done with a dishonest intention, but s. 105 of the Insurance Act postulates no intention and punishes as an offence the mere withholding of the property-whatever be the intent with which the same is done, and the act of application of the property of an insurer to purposes other than those authorised by the Act is similarly without reference to any intent with which such application or misapplication is made. In these circumstances it does not seem possible to say that the offence of criminal breach of trust under the Indian Penal Code is the "same offence" for which the respondents were prosecuted on the complaint of the company charging them with an offence under s. 105 of the Insurance Act. This aspect of the matter based on the two offences being distinct in their ingredients, content and scope was not presented to the learned Judges of the High Court, possibly because the decisions of this Court construing and explaining the scope of Art. 20(2) were rendered later. In Om Prakash Gupta v. State of U.P. (1) the accused, a clerk of a municipality had been convicted of an offence under s. 409 of the Indian Penal Code for having misappropriated

sums of money received by him in his capacity as a servant of the local authority and the conviction had been affirmed on appeal, by the Sessions Judge and in revision by the High Court. The plea raised by the accused before this Court, in which the matter was brought by an appeal with special leave, was that s. 409 of the Indian Penal Code had been repealed by implication by the enactment of sub-ss. (1) (c) and (2) of s. 5 of the Prevention of Corruption Act because the latter dealt with an offence of substantially the same type. This Court repelled that contention. It (1) [1957] S.C.R. 423.

analysed the ingredients of the two offences and after pointing out the difference in the crucial elements which constituted the offences under the two provisions, held that there was no repeal of s. 409 of the 'Indian Penal Code implied by the constitution of a new offence under the terms of the Prevention of Corruption Act. It was the application of this decision and the ratio underlying it in the context of Art. 20(2) ,of the Constitution that is of relevance to the present appeal. The occasion for this arose in State of Madhya Pradesh v. Veereshwar Rao Agnihotry (1). The res- pondent was a tax-collector under a municipality and was prosecuted for offences among others under s. 409 of the Indian Penal Code and s 5(2) of the Prevention of Corruption Act for misappropriation of sums 'entrusted to him as such tax-collector. By virtue of the provision contained in s. 7 of the Criminal Law Amendment Act, XLVI of 1952, the case was transferred to a Special Judge who was appointed by the State Government after the prosecution was commenced before a Magistrate. The Special Judge found the accused guilty of the offence under s. 409 of the Indian Penal Code and convicted him to three years' rigorous imprisonment but as regards the charge under S. 5(2) of the Prevention of Corruption Act, he acquitted the accused on the ground of certain procedural non-compliance with the rules as to investigation prescribed by the latter enactment. The respondent appealed to the High Court against this conviction and sentence under s. 409 of the Indian Penal Code and there urged that by reason of his acquittal in res- pect of the offence under s. 5(2) of the Prevention of Corruption Act, his conviction under s. 409 of the Indian, Penal Code could not also be maintained, the same being barred by Art. 20(2) of the Constitution. The High Court of Madhya Bharat accepted this argument and allowed the appeal and the State challenged the correctness of this decision by an appeal to this Court. Allowing the appeal of the State, Govinda Menon, J., delivering the judgment of the Court observed:

(1)[1957] S.C.R. 868:

> "This Court has recently held in Om Prakash Gupta v. The State of U.P. that the offence of criminal misconduct punishable under s. 5(2) of the Prevention of Corruption Act, 11 of 1947, is not identical in essence, import and content with an offence under s. 409 of the Indian Penal Code In view of the above pronouncement, the view taken by the learned Judge of the, High Court that the two offences are one and the same, is wrong, and if that is so, there can be no objection to a trial and conviction under s. 409 of the Indian Penal Code, even if the respondent has been acquitted of an offence under s. 5(2) of the Prevention of Corruption Act, II of 1947 The High Court also relied on Art. 20 of the Constitution for the order of acquittal but that Article cannot apply because the res- pondent was not prosecuted after he had already been tried and acquitted for the same offence in an earlier trial and, therefore, the well-known maxim "Nemo debet bis vexari, si constat curiae quod sit

> pro una et eadem causa" (No man shall be twice punished, if it appears to the court that it is for one and the same cause) embodied in Art. 20 cannot apply"

Before leaving this part of the case we might also point out that a similar view of the scope of the rule as to double-jeopardy has always been taken by the Courts in America. The words of the Vth Amendment where this rule is to be found in the American Constitution are:

> "Nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb." and it will be noticed that there as well, the ban is confined to a second prosecution and punishment for the same offence. Willoughby after referring to the words quoted in the Fifth Amendment says:

"Cases may occur in which the same act ma y render the actor guilty of two distinct offences; In such cases the accused cannot plead the trial and acquittal, or the conviction and punishment for one offence in bar to a conviction for the other"(1). In Albrecht v.

(1)Constitution of the United States, Vol.II.- p. 1158., United States (1) Brandeis, J., speaking for a unanimous Court said:

"There is a claim of violation of the Vth Amendment by the imposition of double punishment. This contention rests upon the following facts. Of the nine, counts in the information four charged illegal possession of liquor, four illegal sale and one maintaining a common nuisance. The contention is that there was double punishment because the liquor which the defendants were convicted for having sold is the same that they were convicted for having possessed. But possessing and selling are distinct offences. One may obviously possess without selling; and one may sell and cause to be delivered a thing of which he has never had possession; or one may have possession and later sell, as appears to have been done in this case. The fact that the person sells the liquor which he possessed does not render the possession and the sale necessarily a single offence. There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction."

If, therefore, the offences were distinct there is no question of the rule as to double-jeopardy as embodied in Art. 20(2) of the Constitution being applicable. The next point to be considered is as regards the scope of s. 26 of the General Clauses Act. Though s. 26 in its opening words refers to "the act or omission constituting an offence under two or more enactments", the emphasis is not on the facts alleged in the two complaints but rather on the ingredients which constitute the two offences with which a person is charged. This is made clear by the concluding portion of the section which refers to "shall not be liable to be punished twice for the same offence,". If the offences are not the same but are distinct, the ban imposed by this provision also cannot be invoked. It therefore follows that in the present case as the respondents are not being sought to be punished for "the (1) (1927) 273 TT.S. I: 71 Law. Ed. 505.

same offence" twice but for two distinct offences con- stituted or made up of different ingredients the bar of the provision is inapplicable.

In passing, it may be pointed out that the construction we have placed on Art. 20(2) of the Constitution and s. 26 of the General Clauses Act is precisely in line with the terms of s. 403(2) of the Criminal Procedure Code which runs:

> "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)."

It would be noticed that it is because of this provision that the respondents before us were originally charged before the Magistrate in Criminal Case 82 of 1953 with offences under s. 409 of the Indian Penal Code as well as s. 105 of the Indian Insurance Act.

The respondents in this case did not appear in this Court and as the appeal had to be heard ex parte Mr. N. S. Bindra was requested to appear as amicus curiae to assist the Court at the hearing of the appeal. We express our thanks to him for the assistance he rendered.

The appeal is accordingly allowed and the judgment and the order of the High Court is set aside and the case will go back to the Judicial Magistrate, Fourth Court, Poona, for being proceeded with according to law.

Appeal allowed.

Case remanded.