

Sachin S/O Shantilal Bhansali vs State Of Mah., Thr. P.S.O. Ps Malkapur ... on 4 August, 2021

Author: Manish Pitale

Bench: Manish Pitale

CORRECTED-Judgment Cr.WP 119.2020.odt

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL WRIT PETITION NO. 119 OF 2020

Sachin S/o Shantilal Bhansali,
Aged about - 35 years, Occupation -
Business, R/o Malkapur, Buldhana

.. Petitioner

Versus

1. The State of Maharashtra, through
Police Station Officer, Police Station -
Malkapur City, Buldhana

.. Respondents

2. Food Safety Inspector, Buldhana

Mr. Akshay Naik, Advocate for petitioner.
Mr. Sagar Ashirgade, APP for respondents.

	CORAM :	MANISH PITALE, J.
RESERVED ON	:	27/07/2021
PRONOUNCED ON	:	04/08/2021

JUDGMENT

Hearing was conducted through Video Conferencing and the learned counsel agreed that the audio and visual quality was proper.

PAGE 1 OF 15 CORRECTED-Judgment Cr.WP 119.2020.odt (2) Rule. Rule made returnable forthwith. Heard finally with the consent of the learned counsel for the rival parties. (3) The petitioner has invoked the principles of nemo debet bis vexari (no man shall be put twice in peril for the same offence) and autrefois acquit (the person has been acquitted on a same charge on which he is being prosecuted), embodied in Section 300 of the Criminal Procedure Code, 1973 (CrPC), in order to demonstrate that the Court of Chief Judicial Magistrate, Buldhana in the present case has erred in passing the impugned order.

(4) On 27/01/2014, the Food Safety Officer, Buldhana submitted a complaint before the police alleging that banned substance i.e. Gutkha and other such material was found stored in Om Shanti Pan Center at Malkapur, run by the petitioner. On this basis, First Information Report (FIR) stood registered against the petitioner for alleged offences under Sections 188, 273 and 328 of the Indian Penal Code (IPC), as also Section 59(iii) of the Food Safety and Standards Act, 2006 (hereinafter referred to as the 'FSS Act'). (5) Upon completion of investigation, charge-sheet was PAGE 2 OF 15 CORRECTED-Judgment Cr.WP 119.2020.odt filed against the petitioner for offences under Sections 188 and 272 of the IPC and Section 59 of the FSS Act. Regular Criminal Case No.28 of 2014, was conducted in the Court of Judicial Magistrate First Class at Malkapur. After recording of evidence in the said trial, by judgment and order dated 24/08/2015, the petitioner was acquitted of the said offences. The Magistrate found that the material on record was not sufficient to prove the said offences against the petitioner. (6) In the interregnum, during the pendency of the aforesaid trial, another Food Safety Officer, on 20/01/2015, initiated a criminal case before the Court of Chief Judicial Magistrate, Buldhana, for the very same incident dated 27/01/2014, wherein Gutkha and other such material was allegedly recovered from the Pan Center, run by the petitioner. The said proceedings bearing S.C.C.No.90 of 2015, were pending before the Court of Chief Judicial Magistrate, Buldhana when, on 09/02/2018 the petitioner moved an application (Exh.19) before the said Court for dismissal of the said case, by relying upon Section 300 of the CrPC. The petitioner relied upon the aforesaid judgment and order dated 24/08/2015 passed by the Court of Judicial Magistrate First Class at Malkapur, acquitting him of offences under PAGE 3 OF 15 CORRECTED-Judgment Cr.WP 119.2020.odt the IPC and the FSS Act, to contend that criminal proceedings could not be initiated against him again on the basis of the very same allegation and for the same alleged offence under Section 59 of the FSS Act.

(7) On 26/02/2018, the respondents filed their reply, opposing the said application. It was contended that the proceedings before the Judicial Magistrate First Class at Malkapur, were void ab initio, because the Food Safety Officer had not followed the mandate of Section 42 of the FSS Act before initiating prosecution against the petitioner under Section 59 of the FSS Act. By the impugned order dated 27/02/2019, the Court of Chief Judicial Magistrate, Buldhana, rejected the said application filed on behalf of the petitioner. The said Court found that even though there was an order of acquittal in favour of the petitioner for offence under Section 59 of the FSS Act, since the acquittal order was passed by a Court, which was not competent to try offence under the FSS Act, the order of acquittal could be of no avail. It was held that since the order of acquittal was passed by the Court, which could not be said to be a Court of competent jurisdiction, Section 300 of the CrPC could not be invoked. Aggrieved by the said PAGE 4 OF 15 CORRECTED-Judgment Cr.WP 119.2020.odt judgment and order, the petitioner filed the present writ petition in which notice was

issued and the respondents filed their reply. The petition was finally heard.

(8) Mr. Akshay Naik, learned counsel appearing for the petitioner submitted that the Court of Chief Judicial Magistrate failed to appreciate the scope of Section 300 on the CrPC, while passing the impugned order. It was submitted that the finding rendered in the impugned order that the earlier prosecution initiated against the petitioner under the provisions of the FSS Act was without jurisdiction and that the order of acquittal was passed by a Court not competent to try the petitioner under the FSS Act was wholly erroneous and based on an inappropriate appreciation of the position of law. (9) The learned counsel for the petitioner placed reliance on judgment of the Hon'ble Supreme Court in the case of State of Maharashtra and another vs. Sayyed Hassan Sayyed Subhan and others¹, to contend that a Food Safety Officer under the provisions of the FSS Act could initiate criminal proceeding for offences not only under the FSS Act, but also the offences under the IPC, as long as 1 (2019) 18 SCC 145 PAGE 5 OF 15 CORRECTED-Judgment Cr.WP 119.2020.odt allegations levelled against the accused demonstrated ingredients of offences under the FSS Act, as well as the IPC. By relying on the said judgment, it was submitted that the prosecution launched against the petitioner in the first place for the alleged incident dated 27/01/2014, by the Food Safety Officer was competent and it had culminated in an order of acquittal in favour of the petitioner. On this basis, it was submitted that on the very same alleged incident, a second complaint could not have been filed by the Food Safety Officer and that therefore, the application filed by the petitioner under Section 300 of the CrPC for dismissal of the subsequent complaint, ought to have been allowed by the Court of Chief Judicial Magistrate. On this basis it was submitted that the writ petition deserved to be allowed. (10) On the other hand, Mr. Sagar Ashirgade, learned APP appearing on behalf of the respondents submitted that this Court ought to take into consideration the fact that the petitioner himself delayed filing of an application for dismissal of the complaint under Section 300 of the CrPC. It was submitted that although the subsequent complaint was filed on 20/01/2015, when the trial on the basis of the FIR registered at the behest of the Food Safety Officer was PAGE 6 OF 15 CORRECTED-Judgment Cr.WP 119.2020.odt pending, the said application under Section 300 of the CrPC was filed much later on 09/02/2018. It was submitted that if the petitioner had been vigilant and he had filed the said application immediately before the Court of Chief Judicial Magistrate, the matter would have been different. It was then submitted by the learned APP that in the present case, the Food Safety Officer was supposed to follow the specific procedure laid down in Section 42 of the FSS Act for initiating criminal proceedings against the petitioner. By inviting attention of this Court to the said provision, the learned APP submitted that when the allegations levelled against the petitioner pertained to offence under Section 59(iii) of the FSS Act, the matter pertained to a Special Court, as provided under Section 42(4)(b) of the FSS Act. Therefore, the initial complaint leading to registration of FIR, filing of charge-sheet and trial conducted before the Court of Judicial Magistrate First Class, was wholly incompetent. In fact, this was one of the grounds for acquittal of the petitioner and that therefore, the subsequent criminal proceeding initiated by the Food Safety Officer was maintainable. The learned APP supported the impugned order by submitting that acquittal by a Court incompetent to try the petitioner under the provisions of the FSS Act, could not come to his rescue and that the PAGE 7 OF 15 CORRECTED-Judgment Cr.WP 119.2020.odt principles embodied in Section 300 of the CrPC could not be invoked in favour of the petitioner. On this basis, the learned APP sought dismissal of the writ petition.

(11) Heard learned counsel for the rival parties and perused the material on record. Section 300 of the CrPC embodies the aforesaid two principles of *nemo debet bis vexari* (no man shall be put twice in peril for the same offence) and *autrefois acquit* (the person has been acquitted on a same charge on which he is being prosecuted). These principles are slightly different from the principle of double jeopardy embodied in Article 20(2) of the Constitution of India. For invoking the principle of double jeopardy, conviction of the accused is necessary, because the words "prosecuted" and "punished" are used in Article 20(2) of the Constitution of India. Insofar as the Section 300 of the CrPC is concerned, a person convicted or acquitted, cannot be tried for the same offence. Therefore, the principle embodied in Section 300 of the CrPC can be invoked in both scenarios i.e. conviction or acquittal for the same offence. It is based on the aforementioned principle that no man shall be put twice in peril for the same offence.

PAGE 8 OF 15 CORRECTED-Judgment Cr.WP 119.2020.odt (12) In the facts of the present case, it needs to be examined whether the Court of Chief Judicial Magistrate was justified in concluding that the acquittal order passed in favour of the petitioner was that of a Court not competent to conduct the trial against the petitioner. The said finding of the Chief Judicial Magistrate appears to proceed on the basis that the Court of Judicial Magistrate First Class, in pursuance of registration of FIR, filing of charge-sheet and conducting trial was incompetent to consider offences under the provisions of the FSS Act. This appears to be based on the specific procedure prescribed under Section 42 of the FSS Act, pertaining to the manner in which the Food Safety Officer is to proceed for launching prosecution under the FSS Act.

(13) But, this finding appears to be in the teeth of the law laid down by the Hon'ble Supreme Court in the case of *State of Maharashtra vs. Sayyed Hassan Sayyed Subhan* (supra), wherein it has been categorically held that the Food Safety Officer can also lodge complaint for offences punishable under the IPC, in addition to offences under the FSS Act. The Hon'ble Supreme Court has referred to Section 26 of the General Clauses Act, 1897, which provides as PAGE 9 OF 15 CORRECTED-Judgment Cr.WP 119.2020.odt follows :-

"Section 26. Provision as to offences punishable under two or more enactments - 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."

(14) After referring to the said provision, the Hon'ble Supreme Court has held that the Food Safety Officer could certainly initiate prosecution under the provisions of the IPC, as well as the FSS Act, so long as the ingredients of the offences stood satisfied. It was categorically held that the provisions of the FSS Act make it clear that there is no bar for prosecution under the IPC, merely because the provisions in the FSS Act prescribe penalty. Thus, the Court of the Chief Judicial Magistrate in the impugned order committed an error in proceeding on the basis that when FIR was registered against the petitioner for offences under the IPC and the FSS Act, the Court of Judicial Magistrate First Class could not have conducted the trial against the petitioner, insofar as the offence under the FSS Act was concerned. The very basis of the impugned order is found to be erroneous. This is evident from the following observations made by PAGE 10 OF 15 CORRECTED-Judgment Cr.WP

119.2020.odt the Hon'ble Supreme Court in the said case of State of Maharashtra vs. Sayyed Hassan Sayyed Subhan (supra) :-

"7. There is no bar to a trial or conviction of an offender under two different enactments, but the bar is only to the punishment of the offender twice for the offence. Where an act or an omission constitutes an offence under two enactments, the offender may be prosecuted and punished under either or both enactments but shall not be liable to be punished twice for the same offence. The same set of facts, in conceivable cases, can constitute offences under two different laws. An act or an omission can amount to and constitute an offence under the IPC and at the same time, an offence under any other law."

(15) The facts of the present case further show that the subsequent complaint lodged by the Food Safety Officer dated 20/01/2015, also specifically pertains to the same alleged incident dated 27/01/2014, in respect of which the petitioner already faced trial for alleged offences under the IPC and the very same provision i.e. Section 59 of the FSS Act and stood acquitted by the judgment and order dated 24/08/2015. Thus, the subsequent complaint lodged by the Food Safety Officer dated 20/01/2015, pertained to the very same incident and for the very same alleged offence under Section 59 of the FSS Act.

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(16) The Court of Chief Judicial Magistrate committed an

error in the impugned order in proceeding on the basis that the Officer in the first instance was not competent to file charge-sheet for an offence under Section 59 of the FSS Act, because, it was the Food Safety Officer who was supposed to launch the prosecution in terms of Section 42 of the FSS Act and that considering the allegation against the petitioner, the matter ought to have gone to a Special Court referred to in the said provision. The learned APP also referred to acquittal of the petitioner under Section 59 of the FSS Act, not only because lack of evidence, but because the Judicial Magistrate First Class in the judgment and order dated 24/08/2015, while acquitting the petitioner, held that due procedure of law for launching prosecution as mandated under Section 42 of the FSS Act was not duly followed.

(17) But, if the reasoning of the Court of Chief Judicial Magistrate adopted in the impugned order and the contentions raised by the learned APP are to be accepted, it would amount to permitting the

Food Safety Officer to launch prosecution afresh by rectifying the lacuna in the procedure adopted in the first place. This is clearly PAGE 12 OF 15 CORRECTED-Judgment Cr.WP 119.2020.odt impermissible. Therefore, it is found that the aforesaid principles embodied in Section 300 of the CrPC clearly apply in the facts of the present case. The Hon'ble Supreme Court in the case of Ravinder Singh vs. Sukhbir Singh and others 2 in this context has held as follows :-

"25. The principle of issue estoppel is also known as "cause of action estoppel" and the same is different from the principle of double jeopardy or; autrefois acquit, as embodied in Section 300 Cr.P.C. This principle applies where an issue of fact has been tried by a competent court on a former occasion, and a finding has been reached in favour of an accused. Such a finding would then constitute an estoppel, or res judicata against the prosecution but would not operate as a bar to the trial and conviction of the accused, for a different or distinct offence. It would only preclude the reception of evidence that will disturb that finding of fact already recorded when the accused is tried subsequently, even for a different offence, which might be permitted by Section 300(2) CrPC. Thus, the rule of issue estoppel prevents re-litigation of an issue which has been determined in a criminal trial between the parties. If with respect to an offence, arising out of a transaction, a trial has taken place and the accused has been acquitted, another trial with respect to the offence alleged to arise out of the transaction, which requires the court to arrive at a conclusion inconsistent with the conclusion reached at the earlier trial, is prohibited by the rule of issue estoppel. In order to invoke the rule of issue estoppel, not only the parties in the two trials should be the same but also, the fact in issue, proved or not, as present in the earlier trial, must be identical to what is sought to be re- agitated in the subsequent trial. If the cause of action was determined to exist, i.e., judgment was given on it, the same is said to be merged in the judgment. If it was 2 (2013) 9 SCC 245 PAGE 13 OF 15 CORRECTED-Judgment Cr.WP 119.2020.odt determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam. (See : Manipur Administration, Manipur v. Thokchom, Bira Singh, AIR 1965 SC 87; Piara Singh v. State of Punjab, AIR 1969 SC 961; State of A.P. v. Kokkiliagada Meerayya, AIR 1970 SC 771; Masud Khan v. State of U.P., AIR 1974 SC 28; Ravinder Singh v. State of Haryana, AIR 1975 SC 856; Kanhiya Lal Omar v. R.K. Trivedi, AIR 1986 SC 111; Bhanu Kumar Jain v. Archana Kumar, AIR 2005 SC 626; and Swamy Atmananda v. Sri Ramakrishna Tapovanam, AIR 2005 SC 2392)."

(18) Applying the said principle to the facts of the present case, it becomes evident that if the impugned order is upheld and the petitioner is made to face the criminal proceedings subsequently initiated by the Food Safety Officer, it would amount to putting him twice in peril for the same offence. This cannot be permitted and hence the impugned order deserves to be set aside. (19) Accordingly, the present Writ Petition is allowed. (20) The impugned order dated 27/02/2019, passed by the Court of Chief Judicial Magistrate, Buldhana is quashed and set aside.

(21)

The application filed by the petitioner under Section

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300 of the Cr.P.C. (Exh.19) is allowed and accordingly, the proceeding pending before the Court of Chief Judicial Magistrate, Buldhana bearing SCC No.90 of 2015 is dismissed. No Costs.

(22)

Rule is made absolute in above terms.

[MANISH PITALE J.]

KOLHE/P.A.

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