
(2001) 05 J&K CK 0019
In the Jammu And Kashmir High Court
Case No : O.W.P. No. 720 of 1996

Om Kumar and others

APPELLANT

Vs

State and others

RESPONDENT

Date of Decision : 17-05-2001

Acts Referred:

Constitution of Jammu and Kashmir, 1956 — Article 20(2)

Citation : AIR 2002 J&K 55

Hon'ble Judges : TEJINDER SINGH DOABIA, J

Bench : Single Bench

Advocate : P. N. Raina, A. Kapoor, A.A.G., Advocates appearing for the Parties

Judgement

1. An order passed by the Deputy Commissioner, Doda, copy whereof is Annexure, 'F' is subject matter of challenge in this petition. A finding has been recorded by the said Deputy Commissioner to the effect that the petitioner had cut some trees in violation of provisions contained in Section 38 of the Land Revenue Act.

This Section imposes penalty on any person who deals with the trees in contravention of the provisions contained in Sections 35, 36 and 37 of the Land Revenue Act. The concerned Deputy Commissioner has come to the conclusion that in all 90 trees were cut. Its value has been determined and the petitioners have been called upon to pay Rs. 1,83,729 and 90,000. It is this order which is subject matter of challenge in this petition.

What is sought to be urged is that in 1981 permission was granted to the petitioners to cut 10 Deodar trees. These trees were standing in Khasra No. 355. It is submitted that these trees were cut in the year 1981. Latter on, some proceedings were initiated against the petitioners. One of the

cosharer in the above khasra number made a complaint with regard to cutting of the trees. The matter was taken up by the Judicial Magistrate

Bhaderwah. An order was passed by the said Magistrate, holding that police authorities cannot intervene in the matter. It was observed that

whenever property is seized by the police, it has to be restored to the persons from whose custody the property is taken. The case was taken to

the Court of Session. The Court of Session made reference to this Court. An order AnnexureC came to be passed by this Court on August 19

1989. In this order, facts were noticed in the opening para. This para is reproduced below :

On an application of Smt. Geeta Devi, respondent herein, Deputy Commissioner Doda, granted her permission to extract timber from the trees

standing in her property land. After doing the same she obtained form 25 from D.F.O. Bhaderwah for carriage of the scants to Jammu. When

timber was being brought in a truck Tehsildar Bhaderwah sent a wireless message on 27/8/87 to Deputy Commissioner Doda informing that

some scants illegally extracted by Shree, Kumar, husband of Geeta Devi being illegally transported to Jammu, and the timber had been seized by

the police. On this wireless message police station Bhaderwah registered case. FIR No. 142/87 under Sec. 379 RPC. Geeta Devi then made an

application before SubJudge Judicial Magistrate Bhaderwah for releasing the timber and the learned Magistrate Bhaderwah on 21/11/87 passed

an order for release of 198 scants in favour of Smt. Geeta Devi. Aggrieved by that order Prithvi Raj petitioner herein filed a revision petition before

the learned Sessions Judge Bhaderwah who vide his order dated August 2, 1988 has made a reference to this Court for setting aside that order.

2. Ultimately, it was observed that person from whose possession property was seized is entitled to the return of seized articles. Following

observations made by this Court, is being highlighted.

It, however, remains that the police has found the case registered against Geeta Devi and her husband to be completely false and also that Geeta

Devi extracted timber from her own property land in accordance with the permission granted by Dy. Commissioner Doda. It is also a fact that

D.F.O. Bhaderwah after proper inquiry issued form No. 25 to Geeta Devi for transporting the timber to Jammu. The timber was seized in a case

which has not been closed as not admitted. Under law timber is required to be returned to the person from whose possession same had been

seized. Learned Sessions Judge seems to have ignored the above facts while making the reference for setting aside the order of Judicial Magistrate

Bhaderwah. The order of SubJudge Judicial Magistrate Bhaderwah is maintained. Regarding pendency of civil suit in which an interim direction has

also been issued, the Civil Court is required to dispose of the same in accordance with law. No order is, therefore, required to be passed in that

regard by this Court.

3. The further fact is that an application is said to have been preferred before Shri Sudharshu Pandey, IAS, who was SubDivisional Magistrate,

Bhaderwah. This is said to have been filed on 16/4/1986. The requisite averments are made in Paragraph 10 (f) of the writ petition. For facility of

reference, this is being reproduced below;

10(f). That the respondent 3 while he was posted as SDM, Bhaderwah had processed the complaint of Shri Prithvi Raj against the permission

granted to petitioner No. 3, wherein he i.e. the said Prithvi Raj had also claimed ownership of the timber and had further alleged that the petitioner

had felled trees from the land not belonging to them but from the land that had fallen to the share of other cosharers. As after passing of first order

of this Hon'ble Court, copy whereof is Annexure 'C' to this petition and thereafter orders passed by Civil Court, copies whereof are Annexures D

and E to the petition, the petitioners herein were neither summoned at any stage by S.D.M. Bhaderwah or by Deputy Commissioner, Doda and as

petitioners had faith that since the matter directly was subjudice before a competent Court wherein State itself was a party, the question of any

other authority including the S.D.M. Bhaderwah taking parallel proceedings against them would not arise. Unfortunately, for the petitioners

respondent No. 3 Deputy Commissioner, Doda Shri Sudhanshu Pandey was first S.D.M. Bhaderwah, when the complaint against the permission

granted in favour of petitioner No. 3 was issued and also a case initially as on FIR with the police Station Bhaderwah was registered, he Shri

Sudhanshu Pandey was again posted as Deputy Commissioner, Doda when he has passed orders on file which had been in fact dealt with by him

S.D.M. Bhaderwah all along in which he had the knowledge of the orders as

passed by this Hon'ble Court vide Annexure 'C' as also by the Civil Court vide Annexures 'D' and 'E'. The reference by respondent No. 3 to the file of S.D.M. Bhaderwah in the impugned order is nothing but reference to the file, he had authored as S.D.M., the order thus is an order which is violated by mala fides in law and liable to be quashed.

4. It is the case of the petitioners that Shri Sudanshu Pandey, IAS, had made some report to the Deputy Commissioner Doda. Later on, Shri Sudhanshu Pandey, IAS, came to be posted as Deputy Commissioner, Doda and he on the basis of the report which he had submitted in his capacity as S.D.M., Bhaderwah, passed an order dated 29.9.1994 as Deputy Commissioner Doda, by which liabilities to the extent indicated above were created against the petitioner. This order was challenged before the JandK Special Tribunal. The Tribunal found no reason to differ with the order passed by the Deputy Commissioner, Doda. The Revision Petition was dismissed. It is this order which is the subject matter of challenge in this petition. It is submitted;

i. that once on the criminal side, view expressed by this Court was that no case under Section 379 Cr.P.C. has been made out then there was no justification to deal with the matter again by the S.D.M. or for that matter Dy. Commissioner Doda for the same cause of action and with regard to the same issue.

ii. that no proceedings could be taken in view of the provisions contained in Article 20 of the Constitution of India.

iii. that Civil proceedings with regard to the same matter are pending before the Civil Court and whatever be the decision given by it would naturally be abide the events.

5. The argument that once the petitioner was found to be not guilty of having committed an offence u/S. 379 of the RPC, then the question of

taking further proceedings under the J and K Land Revenue Act does not arise, and that in this situation, Article 20 of the Constitution would be

attracted be examined. Before noticing this argument, it would be apt to notice the provisions of Rule 6 of the Rules framed under the Jammu and

Kashmir Agrarian Reforms Act, 1976 and also Sections 36 and 38 of the Land Revenue Act. These provisions reads as under :

For the purposes of these rules trees are divided into the following classes :

- A. (Chinar) Pipal and Bohar
- B. Deodar (Diar and Palunder)
- C. All other Royal trees as specified in (Section 46 of the Land Revenue Regulations, 1980) and also Sum (Hum)
- D. All other trees except (Mulberry and Walnut)

Part II

The following rules apply to trees on private lands only;

5. Living trees of Class 'A' shall not be cut felled, barked, killed, topped, or otherwise interfered with by any person.

6. Living trees of classes B and C may be made use of by the rightholder without interference of any kind but may not be sold or bartered.

6. Sections 36, 37 and 38 of the Land Revenue Act are also being reproduced below :

36. Provision relating to royal and reserved trees. Rights of the Government in royal trees. All trees of the following descriptions namely :

English name Botanical name Local names

In the Provinces of Jammu and Kashmir

Deodar Cedrus Libani Var Deodar Deodar, Diar

Chil pine Pinus Longifolia Chil, Chir

Blue Pine Pinus Exceisa Kairu Biar, Kail, Kachir

Edible pine Pinus Garardiana Chilghoza, Iri

Fir Abies Pindrow Rewar Budlu, Rai Rayal, Tung Saran

Spruce Pices Morinda Kachal, Kachhlu Tos, Riar

Himalayan Cypress Cuprescus Torulosa Padam

Pencil Cedar Juniperus Macropoda Shelai, Chheali Padam, Dhua

Chenar Platanus Orientalls Chenar, Buin

Box Buxes Sumpervirens Chikri.

(Provisions of Ladakh and Gilgat are not being reproduced)

37. Reserved trees (1) All trees of the following descriptions namely :

English name Botanical name Local names

In the Province of Jammu

Mulberry Morussp Tut

38. Penalties : 'A person proved to the satisfaction of an Assistant Collector not below the rank of a Tahsildar to have done any act prohibited by

Sections 35A, 36 and 37 shall be liable to a fine which may extend to rupees five hundred and the wood of the trees so felled from State or private

land shall be confiscated and shall also be liable to make good to the State any loss or damage caused by such act :

Provided that, a person who has been fined under this Section shall not be prosecuted under the Criminal Law for the same act and a person who

has been punished under the Criminal Law for any act prohibited by Section 35A, 36 or 37 shall not be liable to a fine under this Section.

Such loss or damage shall be assessed by Assistant Collector and the amount may be recovered from the person held liable as if the same were

arrears of the land revenue.

7. A perusal of these provisions would show that action as contemplated or taken under the J and K Agrarian Reforms Act or under the Land

Revenue Act is entirely different. This has got nothing to do with the question which came to be decided by this Court in Criminal Reference

referred to above, the issue involved was as to whether the property is required to be returned to the person from whom its possession was taken.

As possession was taken from the petitioner, which was apparent from the report, therefore it was ordered to be returned to her. Incidentally,

some finding has been recorded u/S. 379 of the Ranbir Penal Code. These findings have nothing to do with the question as to whether a tree, if

cut, in breach of the sanction granted or the permission obtained would render a person liable to penalties under two statutes referred to above or

not.

8. The question as to whether Article 20 is violated in any manner be examined. It is Clause (2) of Article 20 which enshrines the well known

principle of criminal jurisprudence that no one should be put in jeopardy twice for the same offence. See AIR 1966 SC 69 Mohd. Safi v. State of

W.B. In Maqbool Hussain v. State of Bombay, AIR 1953 SC 325, the Supreme Court observed :

The Fundamental Right which is guaranteed in Art. 20 (2) enunciates the principle of 'autrefois convict' or 'double Jeopardy'.

The roots of that principle are to be found in the well established rule of the Common Law of England that where a person has been convicted of

an offence by a Court of competent jurisdiction the conviction is a bar to all further criminal proceedings for the same offence (Per Charles J. in

Reg v. Niles, (1890) 24 QBD 423 (A) : 59 LJMC 56. To the same effect is the ancient maxim *Nemo bis debet puniri pro uno delicto* that is to say

that no one ought to be twice punished for one offence or as it is sometimes written '*pro eadem causa*' that is for the same cause.

9. The corresponding provisions in the Federal Constitution of the United States of America is contained in the Fifth Amendment which among

other things provides ""nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.

10. The principle on which this Clause is based has been given effect to by the Legislature in S. 403 of the Code of Criminal Procedure and S. 26

of the General Clauses Act, 1987.

11. The above Section i.e. Section 403 is wider than subclause (2) of Article 20. It embodies both the principles known as *autrefois acquit* and

autrefois convict. In other words under S. 403 of the Code of Criminal Procedure a person who has once been tried and acquitted cannot again

be tried for the same offence. But under Clause (2) of Article 20 the prohibition is against a person being subject to punishment twice for the same

offence. Hence, if at the previous trial a person was acquitted there will not be a bar under this clause to his being tried again for the same offence.

12. The fundamental conditions for the applicability of clause (2) of Article 20 are :

(a) there must have been a previous prosecution.

(b) the accused must have been punished at such prosecution.

(c) the subsequent proceeding must also be one for the prosecution and punishment of the accused.

(d) the proceedings on both the occasion must be in relation to the same offence, *Kharkan v. State of U.P.*, AIR 1965 SC 83.

13. Thus it is clear that it is essential for the applicability of the Clause that the previous prosecution must have ended in the punishment of the

accused. Otherwise the fresh prosecution of the accused will not be barred under this Clause. In *Maqbool Hussain v. State of Bombay*, (AIR

1953 SC 325) (supra) the Supreme Court observed as follows :

It (Art. 20 cl. (2) incorporated within its scope the plea of autrefois convict as known to the British jurisprudence or the plea of double jeopardy

as known to the American Constitution but circumscribed it by providing that there should be not only a prosecution but also a punishment in the

first instance in order to operate as a bar to the second prosecution and punishment for the same offence.

14. But this does not mean that notwithstanding S. 403 of the Code of Criminal Procedure a person who has once been tried and acquitted of a

criminal offence can again be tried for the same offence. It only means that there is no constitutional bar to a legal provision under which such fresh

trial is permissible. In other words if there is a law under which notwithstanding the previous acquittal of a person in regard to an offence a fresh

trial of such person in regard to the same offence is permissible such a law would not be ultra vires because such a law would be within the

sanction of the Constitution. But Article 20 (2) only permits such legislation and does not prohibit a law which bars a fresh trial even where the

accused was acquitted on the previous occasion and consequently, there is no question of inflicting on him a double punishment for the same

offence.

15. This clause will not apply where at the previous trial the accused was not sentenced at all but although convicted was released on probation of

good conduct (instead of being sentenced to any punishment). Under S. 562 of the Criminal Procedure Code. The reason is that in such a case the

accused is not punished twice for the same offence. Under Section 562 of the Criminal Procedure Code it is expressly provided that the Court

may instead of sentencing him (accused) at once to any punishment direct that he be released on his entering into a bond..... This clearly shows

that when action is taken under S. 562 the accused though convicted is not punished. Hence, when a fresh prosecution is started against him there

is no question of his being punished twice for the same offence and fresh prosecution will not be barred under this clause.

16. The words prosecuted and punished are not to be read distributively so as to mean prosecuted or punished. Unless both the factors coexist

this clause will not apply. *Thomas Dana v. State of Punjab*, AIR 1959 SC 375. In

other words the mere fact that there was a previous prosecution

without its ending in a punishment of the accused will not bar a fresh prosecution under this Clause. *Ebrahim Wazir v. State of Bombay*, AIR 1953

SC 375 (sic).

17. The proceeding in both the cases must be a prosecution *Venkataraman v. Union of India*, AIR 1954 SC 375. The two proceedings must be

distinct ones. Thus if the subsequent proceeding is but a part of the previous proceeding and not a distinct proceeding as for instance an appeal

neither the principle of this Clause nor that of Section 403 of the Criminal Procedure Code will operate as a bar to the proceeding *State of M.P. v.*

Veereshwar Rao Agnihotri, AIR 1957 SC 592. In order that the protection of Cl. (2) may be invoked by a person there must have been a

prosecution and punishment in respect of the same offence before a Court of law or a judicial tribunal required by law to decide the matters in

controversy judicially on evidence on oath which it must have been authorised by law to administer and not before a tribunal which entertains a

departmental or an administrative enquiry even though set up by a statute but not required to proceed on legal evidence given on oath. The very

wording of Art. 20 and the words and phrases used therein 'convicted' and 'Commission of the act charged as an offence be subject to a penalty

'commission of the offence' 'prosecuted and punished' 'accused of any offence' indicate that the proceedings therein contemplated are of the

nature of criminal proceedings before a Court of law or a judicial tribunal and the prosecution in this context would mean an initiation or starting of

proceedings of a criminal nature before a Court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which

creates the offence and regulates the procedure.

18. A true judicial decision presupposes an existing dispute between two or more parties and involves four requisities :

(a) the presentation (not necessarily orally) of their case by the parties to the dispute.

(b) if the dispute between them is a question of fact the ascertainment of the fact by means of evidence adduced by the parties to the dispute and

often with the assistance of argument by or on behalf of the parties on the evidence.

(c) if the dispute between them is a question of law the submission of legal argument by the parties and

(d) a decision which disposes of the whole matter by a finding upon the facts in dispute and application of the law of the land to the facts so found

including where required a ruling upon any disputed question of law. *Moqbool Hussain v. State of Bombay*, AIR 1953 SC 325.

19. A civil action is not a prosecution within the meaning of this clause and therefore a civil suit for penalty against one previously convicted may be

brought without violating this Clause. Conversely a decree for damages in a civil suit for defamation will not bar a criminal prosecution for

defamation. An acquittal on a criminal charge would not bar a civil action by the State arising out of the same facts. Although this latter proposition

is not directly covered by this Article inasmuch as there is no previous punishment in such a case so as to involve a double punishment for the same

offence yet it shows that a civil action is not a prosecution for the purpose of this clause. *Thomas Dana v. State of Punjab*, AIR 1959 SC 375.

20. Thus in this case action which is contemplated by the two provisions is entirely different and therefore the provisions of Article 20 which lay

down that no person shall be prosecuted or punished for the same (?) more than once would not be attracted to the facts of this case. As such the

argument put across by the learned counsel for the petitioner in this regard cannot be accepted.

21. Again the argument raised that because a civil suit has been filed and a finding has to be returned in one way or the other and as such petitioner

who is a party to those proceedings, therefore, proceedings under J and K Agrarian Reforms Act and the Rules cannot be taken is again an

argument which cannot be accepted. Taking of civil proceedings and imposing of penalty under the penal provisions contained under the J and K

Land Revenue Act and the Agrarian Laws is entirely different.

22. This argument cannot be accepted.

23. The argument that the Deputy Commissioner who passed the final order is the same person who had made the report is an argument which

deserves to be given serious consideration. This aspect of the matter has not been disputed by the respondents. The least which was required to be

done was that the officer who had made a report should not have dealt with the

matter himself.

24. I am accordingly of the view that on this limited issue a finding can be returned in favour of the petitioner. This petition as such is allowed. The

matter would go to the Deputy Commissioner Doda who would rehear the same and pass such order as may be deemed proper. If the report of

the Subdivisional Magistrate has to be relied upon then a copy thereof could be made available to the petitioner.