

BOMBAY HIGH COURT

State

Vs.

Pandurang Baburao

Criminal Appeal No. 1294 of 1954

(Chagla, C.J., Dixit and Desai, JJ.)

21.02.1955. 22.04.1955

JUDGMENT

Chagla, C.J.

1. The accused was charged with having committed an offence under Section 409, Penal Code, in that in January 1951 while being in charge of the villages Harchori and Road Khandkar as a talati he committed criminal breach of trust in respect of Rs. 101-6-0 by dishonestly misappropriating the amount and he failed to credit this amount into the Ratnagiri Sub-Treasury by 5-1-1951. The learned Judicial Magistrate, First Class, Ratnagiri, convicted the accused and sentenced him to one month's simple imprisonment and a fine of Rs. 100, in default simple imprisonment for 15 days. The accused appealed to the Sessions Judge, Ratnagiri, and the learned Sessions Judge acquitted the accused on the preliminary ground that inasmuch as the accused was prosecuted without a sanction, the trial of the accused was bad and the order of conviction cannot stand. The State has come in appeal against the order of acquittal passed by the learned Sessions Judge.

2. The view taken by the Sessions Judge following a decision of this Court is that inasmuch as the facts disclosed by the prosecution constituted an offence both under Section 409, Penal Code, and also under Section 5 (2), Prevention of Corruption Act (2 of 1947), and inasmuch as under Section 6, Prevention of Corruption Act, a sanction was necessary before the prosecution could be launched, it was not open to the prosecution to evade the provisions with regard to sanction and prosecute the accused under Section 409, Penal Code. Therefore, the very short question that we have to consider in this full bench is whether the passing of Act 2 of 1947 which requires a sanction makes it obligatory upon the prosecution to prosecute the accused under Act 2 of 1947 after taking the necessary sanction and the prosecution is prevented from prosecuting the accused under Section 409, Penal Code without a sanction.

3. The offence, as already pointed out, was alleged to have been committed on 25-1-1951. Act 2 of 1947 came into force on 11-3-1947 and there was an amendment to this Act by Act 2 of 1952 which came into force on 28-7-1952, and there was a second amendment to this Act 59 of 1952 which came into force on 12-8-1952. This amendment substituted Section 5(4) in the original Act and the subsection provided:

"The provisions of this section shall be in addition to, and not in derogation of, any other law for the time being in force, and nothing contained herein shall exempt any public servant from any proceeding which might, apart from this section, be instituted against him".

The effect of this section came to be considered in a Full Bench of this Court in - '*State v. Sahebrao*¹', and in that decision we pointed out that it was open to the State to prosecute a public servant under Section 409 Penal Code, according to the procedure laid down in the Criminal Procedure Code, 1898, notwithstanding the special provisions contained in the Prevention, of Corruption Act 1947, and the Criminal Law Amendment Act, 1952.

In that case the offence was committed after Section 5 (4) came into force. In the case before us the offence was committed prior to the coming into force of the second amendment and the complaint was also filed on 18-8-1951, which was prior to the coming into force of Section 5 (4), and the question that arises is whether in the absence of Section 5 (4) the position in, law is different from what we laid down in the Full Bench decision.

4. This Full Bench has been necessitated by reason of the fact that a Division Bench of this Court in - '*Navla Samta v. The State*²', took the view that if one enactment constituting a certain act to be an offence required a sanction and another enactment constituting the same act also an offence did not require a sanction, it was obligatory upon the prosecution to proceed under the enactment which required a sanction, because the view was taken that if the prosecution did not do so, it would amount to evading the provision of law which required a sanction which was a procedure laid down for the benefit of the accused. Mr. Justice Bavdekar and Mr. Justice Vyas felt themselves compelled to take that view largely by reason of the fact that there was an earlier decision of this Court reported in - '*Emperor v. Apaya*³', in which according to the learned Judges the same view was taken. In their judgment the two learned Judges have also referred to a decision of the Supreme Court reported in - '*Basir-ul-Huq v. State of West Bengal*⁴', where Mr. Justice Mahajan delivering the judgment of the Court observed (page 206):

"Though, in our judgment, Section 195 does not bar the trial of an accused person for a distinct offence disclosed by the same facts and which is not included within the ambit of that section, it has also to be borne in mind that the provisions of that section cannot be evaded by resorting to devices or camouflages. The test whether there is evasion of the section or not is whether the facts disclose primarily and essentially an offence for which a complaint of the Court or the public servant is required. In other words, the provisions of the section cannot be evaded by the device of charging a person with an offence to

which that section does not apply and then convicting him of an offence to which it does, upon the ground that such latter offence is a minor offence of the same character".

Applying this principle the learned Judges thought that the facts primarily and essentially disclosed an offence which fell under Section 5 (2), Prevention of Corruption Act and therefore the prosecution would be guilty of a device or a camouflage in prosecuting the accused under Section 409, Penal Code and not under the Prevention of Corruption Act.

¹ AIR 1954 Bom 549 (FB)

³15 Bom LR 574

² Cri Appln. No.94 of 1953 (Bom)

⁴ AIR 1953 SC 293

With very great respect, the learned Judges over-looked the vital distinction which exists between a case where offences in respect of the same facts are constituted under the same enactment and offences are constituted under different enactments. Both the case reported in '15 Bom LR 574 (C)' and the decision of the Supreme Court in - '*Basir-ul-Huq v. State of West Bengal*', turned on the important fact that the accused could have been prosecuted under the same enactment in respect of the same acts for two different offences, one requiring a sanction and the other not requiring a sanction, and it is on those facts that both our High Court in - '15 Bom LR 574, and the Supreme Court laid down the salutary principle that it was not open to the prosecution at its own option to proceed under a particular section under the Indian Penal Code which did not require a sanction when the facts disclosed would constitute an offence under a different section which would require a sanction. Again with very great respect to the two learned Judges, they over-looked the clear provisions of Section 26, General Clauses Act, and really the answer to the question raised in this full bench is to be found in the terms of that section of the General Clauses Act. Section 26, General Clauses Act, 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".

Therefore, there is clear legislative sanction in favour of the option to be exercised by the prosecution where an act or omission constitutes an offence under two different enactments, and the Legislature has made it quite clear that the offender is liable to be prosecuted either under one or the other enactment. The only prohibition contained in Section 26 is that the offender is not liable to be punished twice for the same offence.

It will be noted that Section 26 only applies when an act or omission is constituted an offence by two or more different enactments. Section 26 has no application when the act or omission is constituted an offence under the same enactment and the same act or omission is constituted a different offence also under the same enactment. Therefore, both the judgment in - '15 Bom LR 574 (C)' and the judgment of the Supreme Court naturally ignored Section 26 because Section 26 had no application. But in the case before Mr. Justice Bavdekar and Mr. Justice Vyas, Section 26 had direct application, because these learned Judges were dealing with a case where an act constituted an offence under two enactments, the Indian Penal Code and the Prevention of Corruption Act.

5. This view of the law has been taken both by the Allahabad High Court and by the Calcutta High Court. See - '*Bhup Narain v. State*⁵', where the learned Chief Justice in terms refers to Section 26 of the General Clauses Act at page 37; and also the decision of the Calcutta High Court in - '*Mahammad Ali v. State*⁶',

6. Mr. Walawalkar has strongly relied on the judgment of the Punjab High Court in - '*The State v. Gurcharan Singh*⁷', The decision of the Punjab High Court was based on two grounds. One was that Section 26 of the General Clauses Act has no application because the Prevention of Corruption Act introduced various important procedural changes. It is pointed out that whereas under Section 409, Penal Code, no sanction is necessary when

⁵ AIR 1952 All 35

⁷ AIR 1952 Pun 89

⁶ AIR 1953 Cal 681

the person prosecuted is not a high official; the Prevention of Corruption Act requires a sanction in the case of every accused. It is further pointed out that in the Prevention of Corruption Act the accused has been made a competent witness, and finally that the maximum sentence which can be imposed under the Prevention of Corruption Act is much less severe than the maximum sentence under Section 409, Penal Code. With great respect to the Punjab High Court, it is difficult to understand how it is possible to take that view of Section 26 of the General Clauses Act. If Section 26 only applied when two enactments constituted an act an offence without any procedural change or without any alteration in the punishment, then there would be no necessity whatsoever for a subsequent enactment dealing with the same act. Further, when Section 26 provides that the offender shall be liable to be prosecuted and punished under either or any of those enactments, what the Legislature clearly intended was that he shall be liable to be prosecuted according to the procedure laid down under the enactment under which he was being prosecuted, and in the full bench decision also the view that we have taken is that, the special procedure set up under the Prevention of Corruption Act does not entitle a public servant to insist that the only proceeding which could be instituted against him must be under the special Act and not under the Criminal Procedure Code. Therefore, in our opinion, Section 26 has application provided the same act has been constituted an offence under more than one enactment. It makes no difference to the application of Section 26 that the procedure laid down in the two enactments with regard to the prosecution of the offender is different or even if different sentences are provided under the two enactments. The second ground on which the decision of the Punjab High Court was based was that the provisions of the Prevention of Corruption Act 'pro tanto' repealed the provisions of the Indian Penal Code with regard to the same offence. Undoubtedly, Section 26, General Clauses Act, can only have application if both the enactments are in force, and if we are satisfied that the subsequent Act of the Legislature has repealed either expressly or impliedly the earlier legislation, then the prosecution can only be under the subsequent enactment, and therefore we must proceed to examine the argument which found favor with the Punjab High Court that the Prevention of Corruption Act has repealed the provisions of Section 409, Penal Code. It will perhaps be advisable to bear in mind certain general principles with regard to an implied repeal by the Legislature of an earlier legislation by a subsequent legislation.

The Prevention of Corruption Act does not expressly repeal the provisions of the Indian Penal Code and therefore the most that can be said is that there is an implied repeal. The Court never looks with favour upon the suggestion that there is an implied repeal and the inclination of the Court will always be against the repeal of an earlier statute when the Legislature has not expressly done so. In this case, far from there being any express repeal, the Legislature by subsequently enacting Section 5(4) has made it clear what its intention was when it put this legislation on the statute book, and as we have pointed out in the full bench decision, Section 5(4) was passed in order to rebut the view taken by the Punjab High Court that there was an implied repeal of Section 409, Penal Code, by the provisions of Act 2 of 1947. The language used by the Legislature in Section 5 (4), viz. "The provisions of this section shall be in addition to, and not in derogation of, any other law for the time being in force, and nothing contained herein shall exempt any public servant from any proceeding which might apart from this section be instituted against him", clearly negatives any suggestion that the Legislature intended to repeal the provisions of the earlier statute, viz., the Indian Penal Code. But what is urged by Mr. Walavalkar on the strength of the judgment of the H.C. is that we must assume an implied repeal by reason of the important procedural changes introduced in the Subsequent legislation. We have already referred to what those important procedural changes are, and the contention is that the principle is well settled that when a subsequent legislation alters the procedure with regard to the prosecution of an offence or alters the punishment, the Court must presume that the Legislature intended to repeal the earlier statute.

7. Now, the well known authority on Statute Law, Craies, at p.344 quotes Dr. Lushington in - 'The India', (1864) 33 LJ PM and A 193 .

"What words will establish a repeal by implication it is impossible to say from authorities or decided cases. If on the one hand the general presumption must be against such a repeal, on the ground that the intention to repeal, if any had existed, would have been declared in express terms, so on the other hand, it is not necessary that any express reference be made to the statute which it is intended to repeal. The prior statute would, I conceive, be repealed by implication if its provisions were wholly incompatible with a subsequent one; or if the two statutes together would lead to wholly absurd consequences; or if the entire subject matter were taken away by the subsequent statute."

Applying this test to the two enactments, it is impossible to say that the provisions of the two are wholly incompatible or that the two statutes together would lead to wholly absurd consequences. Maxwell, another well known authority on the interpretation of statutes, at p.186 states:

"It would seem that an Act which (without altering the nature of the offence, as by making it felony instead of misdemeanour) imposes a new kind of punishment, or provides a new course of procedure for that which was already an offence, at least at common law, is usually regarded as cumulative and as not superseding the pre-existing

law."

It may also be pointed out that certain earlier English decisions seem to have taken a contrary view, but that was at a time when there was no statutory provision in England corresponding to Section 26, General Clauses Act. But in the English Interpretation Act of 1889 a similar provision was embodied and that was in, Section 33 which is practically in terms identical with the provisions of Section 26 of the General Clauses Act.

8. Therefore, looking at these text books it seems to us that the present position in England with regard to the passing of a subsequent penal law is the same as in India. Therefore with respect, we are unable to agree with the view taken by the Punjab High Court either that Section 26, General Clauses Act has no application or that Act 2 of 1947 has repealed 'pro tanto' the provisions of the Indian, Penal Code.

9. Therefore, in our opinion, it is open to the prosecution to launch a prosecution either under Section 409, Penal Code, or under Section 5(2), Prevention of Corruption Act even before the amendment of Act 2 of 1947 by Act 59 of 1952, and if the prosecution is launched under Section 409 and if the status of the accused is such that no sanction is required under the provisions of the Criminal Procedure Code, then the prosecution is good and the conviction is proper notwithstanding the fact that if the prosecution had been launched under Section 5(2) a sanction would have been necessary.

10. There is one further point to which a passing reference might be made. Mr. Walawalkar wanted to argue that the different provisions in the two laws offended against equality before the law provided by Article 14 of the Constitution. Now, this particular Act has gone up before the Supreme Court and it is rather significant that counsel who appeared for the accused in that case, - *'Ramaya Munipalli v. State of Bombay'*⁸, did not contend that this particular Act offended against Article 14 of the Constitution. Although this is not conclusive of the matter, it does seem to suggest that counsel in that case did not think that a useful argument could have been advanced with regard to Article 14. But the other difficulty in Mr. Walawalkar's way is that under Article 14 he can only challenge Section 5(2) of Act 2 of 1947. If the accused had been convicted under that Act, possibly that argument would have been open to Mr. Walawalkar, but inasmuch as the accused has been prosecuted and convicted under Section 409, Penal Code, no question of Article 14 can possibly arise. Therefore, we have not thought it necessary to consider the question as to whether Act 2 of 1947 is bad as offending the provisions of Article 14.

11. The result is that we must set aside the order of acquittal passed by the Sessions Judge and send the matter back to him to dispose of the appeal on merits.

Dixit, J.

12. I agree, and have nothing to add.

Desai, J.

13. I agree. I have reached the conclusion that the debatable question referred to this Bench must be answered in the affirmative but prefer to found myself mainly on the amendment brought about by Act 59 of 1952, whereby Sub-Section (4) was substituted in Section 5, Prevention of Corruption Act. The Legislature has now in express and explicit terms explained that the provisions of this section shall not be in derogation of any other law for the time being in force. This amendment was obviously intended to apply to Section 409, Penal Code and to rebut the contrary view taken by the Punjab High Court. By this amendment the Legislature did not, in my opinion, modify or alter the effect of the law as already enacted in Section 5.

14. It was, however, urged that to apply this substituted Sub-Section (4) to the facts of a case of which cognizance had been taken before it came into force would be to give retrospective operation to it. In my opinion this sub-section does no more than clarify or explain what had already been enacted. In case of an amendment of this nature enacted solely 'ex abundanti cautela' no question really arises of giving any prospective or retrospective operation. To my mind all that the Legislature did in putting this amendment on the statute book was to explain or declare its intention which was already there by making it more manifest and explicit. In the context of the amendment under consideration it is hard to see how in giving effect to the substituted section the Court can be said to give it retrospective operation. Therefore, the appeal must succeed.

Appeal allowed.